

WHISTLEBLOWER PROTECTION

by
Albert G. McGrath, Jr.
Baker & McKenzie
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Introduction

The Sarbanes-Oxley Act of 2002 (the "Act"), signed into law on July 30, 2002, contains broad employee whistleblower protections that subject companies and, among others, their officers, employees and agents to significant civil and criminal penalties for retaliating, harassing, or discriminating against employees who report suspected wrongdoing. The principal whistleblower provision is found at Section 806 of the Act, which amends Title 18 of the United States Code to add Section 1514A. However, certain other provisions of the Act are also designed to promote corporate accountability. These provisions are noted below, as are other general whistleblower protections that were in place before the Act.

Who is subject to Section 806?

Companies listed on U.S. stock exchanges, companies otherwise obligated to file reports under the Securities Exchange Act of 1934, and their officers, employees, contractors, subcontractors, and agents are governed by Section 806.

(a) WHISTLEBLOWER 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, . . .

What protection is available under Section 806?

Companies subject to the whistleblower provisions may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate" against an employee protected by Section 806. Section 806 protects employees who lawfully provide information to governmental authorities concerning conduct they reasonably believe to constitute mail, wire, or securities fraud, violations of any rule or regulation issued by the Securities and Exchange Commission, or violations of any other Federal law relating to fraud against shareholders. Specifically, Section 806 protects any employee who provides such information, causes the information to be provided, or otherwise assists in an investigation regarding such conduct. The employee is protected if 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 a Congressional committee; (c) any company employee with supervisory authority over the employee; or (d) any company employee with authority to investigate, discover, or terminate prohibited corporate misconduct.

Also, Section 806 protects employees who 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 company) alleging corporate fraud covered by the Act.

(a) *[No 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.*

What can a protected person do under Section 806?

An employee who claims he or she has been discharged or otherwise discriminated against in violation of Section 806 must file a complaint with the Department of Labor within 90 days after the date the alleged violation occurs. The Secretary of Labor will investigate the allegations and issue a decision regarding the alleged wrongdoing. If the Secretary of Labor fails to issue a determination within 180 days after the complaint is filed, through no fault of the employee, the employee may initiate a civil lawsuit in a United States District Court.

(b) ***ENFORCEMENT ACTION. -***

(1) ***IN GENERAL. - A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by -***

(A) *filing a complaint with the Secretary of Labor; or*

(B) *if the Secretary 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 claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.*

(2) *PROCEDURE. -*

(A) *IN GENERAL. - An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.*

(B) *EXCEPTION. - Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.*

(C) *BURDENS OF PROOF. - An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.*

(D) *STATUTE OF LIMITATIONS.-An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.*

The operative procedures cited in Section 806 were enacted as part of the *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century* found at Public Law 106-181.

What remedies are available to protected persons under Section 806?

Section 806 provides that an employee who prevails in a whistleblower action brought under that section is entitled to all relief necessary to make the employee whole, which may include reinstatement, back pay, and special damages, including litigation costs, expert witness fees, and reasonable attorney fees.

(c) *REMEDIES. -*

(1) *IN GENERAL. - An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.*

(2) *COMPENSATORY DAMAGES. - Relief for any action under paragraph (1) shall include -*

(A) *reinstatement with the same seniority status that the employee would have had, but for the discrimination;*

(B) *the amount of back pay, with interest; and*

(C) *compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.*

Are the remedies provided in Section 806 exclusive?

No, the remedies provided in Section 806 are not exclusive.

(d) *RIGHTS RETAINED BY EMPLOYEE. - Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."*

May criminal penalties be imposed for violations of Section 806?

The Act imposes broad criminal penalties in various sections. The prohibitions of Section 806 are strengthened by a specific provision found in Section 1107 of the Act. That section, which amends Section 1513 of Title 18, provides that any person who "knowingly, with the intent to retaliate, takes any action harmful to any person . . . for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense" is subject to a substantial fine, imprisonment for up to ten years, or a combination of both.

(e) *Whoever 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, shall be fined under this title or imprisoned not more than 10 years, or both.*

What other provisions in the Act promote accountability?

Tampering

The Act includes the *Corporate and Criminal Fraud Accountability Act of 2002*, the *White-Collar Crime Penalty Enhancement Act of 2002* and the *Corporate Fraud Accountability Act of 2002*. Among the provisions of the Act that promote accountability is Section 1102 which imposes criminal penalties for tampering with records or otherwise impeding an official proceeding. Section 1102 amends Section 1512 of Title 18 to include:

(c) *Whoever corruptly -*

(1) *alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or*

(2) *otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.*

Audit Committee Procedures

Additionally, companies with securities listed on national exchanges or quoted with national securities associations will be required to implement procedures for their audit committees to address certain types of whistleblower complaints. Section 301 of the Act amends Section 10A of the Securities Exchange Act of 1934 to provide, among other things:

(4) *COMPLAINTS.* - *Each audit committee shall establish procedures for -*

(A) *the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and*

(B) *the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.*

Related rules were proposed by the Commission on January 8, 2003 and can be found at <http://www.sec.gov/rules/proposed/34-47137.htm>. See *Standards Relating to Listed Company Audit Committees*, Release Nos. 33-8173 and 34-47137.

Disclosures Regarding Code of Ethics

Further, companies listed on U.S. stock exchanges and companies otherwise obligated to file reports under the Securities Exchange Act of 1934 will be required to disclose whether or not such company has adopted a code of ethics for senior financial officers. Section 406 of the Act requires the Securities and Exchange Commission to issue rules to implement this section.

(a) *CODE OF ETHICS DISCLOSURE.* - *The Commission shall issue rules to require each issuer, together with periodic reports required pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reason therefor, such issuer has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.*

(b) *CHANGES IN CODES OF ETHICS.*-*The Commission shall revise its regulations concerning matters requiring prompt disclosure on Form 8-K (or any successor thereto) to require the immediate disclosure, by means of the filing of such form, dissemination by the Internet or by other electronic means, by any issuer of any change in or waiver of the code of ethics for senior financial officers.*

(c) *DEFINITION.* - *In this section, the term "code of ethics" means such standards as are reasonably necessary to promote -*

(1) *honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;*

(2) *full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and*

(3) *compliance with applicable governmental rules and regulations.*

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Final rules have been issued by the Commission and will be effective on March 3, 2003. See <http://www.sec.gov/rules/final/33-8177.htm> for a copy of *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, Release Nos. 33-8177 and 34-47235.

What other whistleblower provisions should be of concern in today's environment?

Fair Labor Standards Act

Title 29 of the United States Code makes it unlawful for any person to discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted any proceeding under the Fair Labor Standards Act.

. . . it shall be unlawful for any person . . .

(3) *to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;*

Penalties can be civil or criminal.

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case

may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. . . .

Civil Rights Act of 1964

Title 42 of the United States Code protects individuals from retaliation for (i) opposing any practice deemed unlawful under the Civil Rights Act of 1964 and (ii) participating in any manner in any investigation under the Civil Rights Act.

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

False Claims Act

The federal False Claims Act is a reward statute that does more than just protect whistleblowers. Claims under this act may be brought if individuals or entities have fraudulently collected federal funds.

SEC. 3729. - FALSE CLAIMS

(a) Liability for Certain Acts. -

Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) *has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;*

(5) *authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;*

(6) *knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or*

(7) *knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that . . .*

(b) *Knowing and Knowingly Defined. -*

For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information -

(1) *has actual knowledge of the information;*

(2) *acts in deliberate ignorance of the truth or falsity of the information; or*

(3) *acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.*

(c) *Claim Defined. -*

For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Successful plaintiffs can collect a significant percentage of the money recovered by the federal government.

SEC. 3730. - CIVIL ACTIONS FOR FALSE CLAIMS

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(b) Actions by Private Persons. -

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

...

(d) Award to Qui Tam Plaintiff. -

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

...

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Other Whistleblower Provisions

Clean Air Act (42 U.S.C. § 7622)

Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610)

Energy Reorganization Act of 1974 (42 U.S.C. § 5851)

Safe Drinking Water Act (42 U.S.C. § 300j-9(i))

Solid Waste Disposal Act (42 U.S.C. § 6971)

Toxic Substance Control Act (15 U.S.C. § 2622)

Federal Water Pollution Control Act (33 U.S.C. § 1367)

Asbestos Hazard Emergency Response Act (15 U.S.C. § 2651)

Surface Transportation Assistance Act (49 U.S.C. § 31105)

Suggestions to address the Act's protection of whistleblowers

- Review your corporate compliance program.
 - Many compliance programs have been implemented in response to the federal Organizational Sentencing Guidelines; should you update?
- Revise existing or adopt new codes of conduct.
 - All encompassing or separate codes for different functions?
- Review existing or establish new complaint intake, response and investigation procedures.

- Internal or third party processing?
- Review existing document retention policies.
 - Are you in compliance with the various statutory and/or regulatory requirements?
- Review human resources procedures and policies that address employee termination.
 - Do your termination procedures contemplate whistleblower complaints?
 - Do your personnel policies impose duties to comply with applicable codes of conduct?
- ABOVE ALL, communicate within the organization about the importance of compliance programs, codes of conduct, complaint procedures, document retention policies, human resource procedures AND train the appropriate employees to implement and maintain your policies, codes and procedures.