

## **Sarbanes-Oxley Act Whistleblower Retaliation Provision**

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In an attempt to restore investor confidence and deter securities fraud, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"). Under Section 806 of SOX, an employer may not retaliate against an employee who provides information about potential securities fraud.

### **Covered employers**

The retaliation provision of SOX applies to companies that are required to register with the SEC under Section 12 of the Securities Exchange Act or that are required to file reports under section 15 (d) of the act, as well as privately held companies acting as contractors, subcontractors, or agents of publicly traded companies.

A covered employer may not retaliate against an employee for engaging in whistleblowing activities. Retaliation includes termination, suspension, demotion, harassment, threats, and any other act that would dissuade a reasonable person from reporting violations of SEC rules or federal laws relating to shareholder fraud.

### **Protected conduct under SOX**

Employees are protected when disclosing information to a federal regulatory agency, a member of Congress, or a supervisor at work about a potential SEC rule or federal law violation related to shareholder fraud. Examples include:

- Reporting shareholder fraud
- Reporting mail fraud
- Reporting wire fraud
- Reporting accounting fraud
- Reporting deficient internal controls to management
- Participating in any proceeding filed or to be filed relating to an alleged violation of securities law
- Reporting an employer's nondisclosure of accurate financial statements to potential investors
- Reporting an employer's improper entries on financial statements
- Exposing senior management's alteration of delinquency reports
- Reporting an employer's use of an unregistered broker to solicit investors in exchange for a commission
- Raising concerns about a supervisor's practice of backdating letters of credit

Under the SOX statute, an employee does not have to demonstrate that they provided information to management about an actual violation of securities law. The employee just needs to demonstrate that they reasonably believed the employer violated an SEC rule or federal law related to shareholder fraud.

### **Burden of proof**

To prevail in a SOX whistleblower retaliation case, an employee must prove the following elements by a preponderance of the evidence:

- that the employee engaged in protected conduct
- that the employer had knowledge of the protected conduct
- that the employer took an adverse personnel action against the employee
- that the protected activity was a contributing factor in the employer's decision to take adverse action

If the employee proves all of these elements occurred, the employee will win the case, unless the employer can prove that it would have taken the same adverse action in the absence of the alleged protected activity.

A prevailing employee can recover back pay with interest, compensatory damages, litigation costs, expert witness fees, and reasonable attorney fees.

### **Procedure for filing a complaint of retaliation**

Employees who believe they were subjected to retaliation for reporting alleged violations of federal securities law or SEC regulations may file a complaint with the Department of Labor within 90 days of the alleged retaliatory action. The DOL must conduct an investigation within 60 days of receiving the complaint and issue a decision on the employee's allegations of retaliation. Once the final decision is made regarding the alleged retaliatory actions, either party can appeal the decision to the Court of Appeals. If the DOL has not issued a final decision within 180 days of filing the complaint, the employee may remove the complaint to a federal district court.

### **Criminal prohibition against retaliation**

In addition to providing a civil remedy for retaliation, SOX includes a criminal whistleblower provision prohibiting retaliation. In particular, Section 1107 of SOX prohibits a person from knowingly retaliating against another for disclosing truthful information to a law enforcement officer regarding an alleged federal offense. A violation can result in fines or imprisonment up to 10 years.