Sarbanes-Oxley: lessons for private employers

by Shelley M. Sullivan and Jennifer L. Anderson

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Imagine that you work for a private, family-run business — your family's business. Let's picture you as the bookkeeper and your husband (fond of red suits and ever reluctant to trim his long white beard) as the master toy craftsman and sole delivery person. With a few good hands, all of whom are very small (you provide reasonable accommodations so they can do their jobs) and like to wear funny hats and shoes (nothing obscene or violating your grooming policy — hard to complain since you allow the beard), your business is by all measures successful.

But one day, a disgruntled hand tells you he's discovered irregularities in the customer account system. Some who are nice have been classified as naughty. Worse, some who are naughty have been classified as nice. You know your husband and the business would be ruined if the customers heard of a problem like that. But you suspect this hand is making a frivolous claim to stir up trouble because your husband reprimanded him for poor work quality, which he takes very seriously. What do you do?

In the wake of Enron-inspired scandals and lawsuits and the enactment of the Sarbanes-Oxley Act in July 2002, employees have become keenly aware of corporate governance — what's naughty as well as what's nice. More employees are reporting allegations of corporate wrongdoing under the shield of the Act's whistleblower protection provisions. As a result, most publicly held companies have implemented strict and clearly defined procedures for reporting and handling employee claims of corporate improprieties.

And although private employers aren't covered by the Act, they aren't completely off the hook — they can be subject to other state and federal whistleblower laws. Private employers that follow the lead of publicly held companies by implementing clear procedures for reporting and handling complaints about company wrongdoing are ahead of the game in terms of building employee morale and reducing legal risks. So even if you're a private employer, you can learn a thing or two from the Sarbanes-Oxley Act about effectively handling and responding to whistleblowers.

Whom the Act protects

The whistleblower provisions of the Act protect employees of publicly held companies who provide information or assist in an investigation involving company conduct they "reasonably believe" violates certain laws, rules, or regulations, including a rule or regulation of the Securities and Exchange Commission, any federal law related to fraud against shareholders, or any law related to wire, mail, or bank fraud. An employee who reasonably believes and alleges a violation has engaged in "protected activity" and can't be discriminated or retaliated against for making the allegation.

What the Act protects

To be protected, an employee's complaint must be based on a reasonable belief that her employer was violating the laws, rules, or regulations covered by the Act. She can't just tell a supervisor that she thinks the company is violating any law, although complaints about laws other than those covered by the Act may be protected by other federal or state laws. She must lodge a complaint that the company is violating a law covered by the Act. She also must have suffered an adverse employment action like a demotion, denial of a promotion, or discharge.

The employer must know about the employee's complaint for the Act's whistleblower provisions to be triggered. After all, it's impossible to discriminate or retaliate against someone for something you never knew about, right? A report brought to the attention of a supervisor or member of management is usually enough to put the company on notice of a complaint.

Finally, the employee must be able to link her complaint with the adverse action. In other words, she must show that her complaint had something to do with the decision to fire, demote, or take some other unfavorable action against her.

If the employee can show all those things, the employer must then show by "clear and convincing" evidence that it would have taken the unfavorable action anyway. For example, if you can show the whistleblower had performance problems before her complaint and was ultimately fired because of them, you may be able to show that you had "clear and convincing" evidence to overcome her proof that her protected activity contributed to her termination.

How publicly held employers have responded

Because of uncertainty about how administrative law judges and courts will interpret this relatively new law, many public employers have implemented clearly defined reporting procedures for employee complaints that they're violating a law protected by the Act. Written policies should name several people to whom the employee can complain — a direct supervisor, the company president, or even an anonymous hot line. The complaint must be made to a person who can investigate it and take any remedial action that might be needed.

In addition, managers should be trained to immediately report any complaints to higher management or the person designated to investigate them. Even if the person receiving the complaint doesn't think that it's based on a reasonable belief or that it relates to one of the laws covered by the Act, it should still be reported up the chain of command or as otherwise directed by your policy to ensure that it's properly investigated.

Once a complaint has been received, your company must take all reasonable steps to prevent retaliation against the employee. You should implement a review process to make sure any proposed unfavorable job action is supported by legitimate reasons unrelated to the complaint. Taking the same types of precautions you observe to avoid

any type of retaliation claim will serve you well in dealing with corporate government whistleblowers.

What private employers can learn from all this

Because of the media attention focused on whistleblower cases in the last few years, more and more employees (of both publicly and privately owned companies) are paying attention to corporate governance. But Sarbanes-Oxley isn't the only law that protects whistleblowers. Many states, including Louisiana, have whistleblower protection laws, and many other federal laws protect employees who complain about or oppose unlawful activity. And most of those other laws aren't limited to publicly held companies.

While having clearly defined reporting procedures and training for managers won't always prevent a whistleblower claim, they may reduce the risk of litigation and liability, particularly if you respond promptly and reasonably to complaints you receive.

You can catch up on the latest court cases involving whistleblowing in the subscribers' area of HRhero.com. Just log in and use the HR Answer Engine to search for articles from our 51 Employment Law Letters. Need help? Call customer service at (800) 274-6774.