

# Management and Defense of Employee Whistleblower Claims

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The following program is intended to provide general information only on whistleblower litigation and recent developments. This program is not intended, and should not be construed, as legal advice. Moreover, state laws and requirements will likely vary and have different requirements. For that reason, attendees of this program should seek appropriate legal advice, specific to the particulars of their organization and their state requirements, if any.

# Whistleblower Law and Developments

- The Legislation
  - Accountability
  - Transparency
  - Criminal Provisions
- The Regulations
  - Meeting with the Complainant
  - Limiting Administrative Discovery
  - Security Risk

# Whistleblower Law and Developments

- The Regulations
  - No Participation by Department of Labor
  - Employer Liability for Actions of Contractor
  - Waiver of Rules
- Judicial and Administrative Decisions
  - Interpreting Sarbanes-Oxley
  - Scope of Coverage

# Investigating Internal Whistleblower Complaints

- Sarbanes-Oxley – An Opportunity and a Mandate
- Building the Internal Reporting Framework
  - Communicate Written Standards
  - Provide Visible Leadership
  - Establish Framework that Builds Credibility
  - Monitor Framework

# Investigating Internal Whistleblower Complaints

- Investigating Whistleblower Claims
  - Manage the In-Take Triage
  - Incorporate “Red-Flag” Protocols
  - Investigate and Take Corrective Action
  - Affirmatively Guard Against Future Retaliation
  - Provide Relief to the Whistleblower
  - Self Report and Improve Controls

## Litigating Whistleblower Complaints

- Administrative Procedure Under Sarbanes-Oxley
  - What is “protected activity”?
- Procedure for Litigating Sarbanes-Oxley Section 806 Complaints
  - Initiating a Sarbanes-Oxley Complaint
  - Whom Do You Represent?
  - OSHA Investigation
  - Initial Decision and Preliminary Order

# Litigating Whistleblower Complaints

- Procedure for Litigating Sarbanes-Oxley Section 806 Complaints
  - Appeal to the Office of Administrative Law Judges
  - The Administrative Review Board's Petition for Review
  - Appeal to the Circuit Court of Appeals

# Litigating Whistleblower Complaints

- Particular Concerns with Sarbanes-Oxley Complaints Before OSHA
  - 90 Day Statute of Limitations
  - The Initial Burden
  - Proceeding in Federal Court
  - Other Statutory or Common Law Claims
  - ADR Agreements

# Litigating Whistleblower Complaints

- Assessing a Whistleblower Complaint
  - Is the Company Covered?
  - Who Received the Complaint?
  - What Conduct was Reported?
  - What Was Communicated?
- Identifying Key Documents and Witnesses
- Addressing Orders of Preliminary Reinstatement

# Litigating Whistleblower Complaints

- Settlement of Sarbanes-Oxley Whistleblower Complaints
  - Confidentiality Concerns with Settlements
  - Requests for Dismissal at the Administrative Level
  - Possible Qui Tam Actions
  - Effect of Settlement on Parallel Litigation

# American Recovery and Reinvestment Act of 2009

- Whistleblower Provision
- What are “covered funds”?
- Who is protected?
- What is protected activity?
- Burden of Proof
- Remedies
  - Reinstatement
  - Back Pay
  - Compensatory Damages
  - Attorneys’ Fees

## Conclusion

- Guidelines for Effective Organizational Compliance
  - Written Standards via Code of Conduct
  - Internal Reporting Mechanism
  - Whistleblower Policy
  - Culture of Compliance/Continuous Improvement
  - Self-Reporting
  - Proactive Management

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