

Comments of the Equal Employment Advisory Council

on

Interim Final Rule; Request for Comments

on

**Procedures for the Handling of Retaliation Complaints Under Section 806
of the Sarbanes-Oxley Act of 2002, as Amended**

**United States Department of Labor
Occupational Safety and Health Administration**

76 Fed. Reg. 68,084 – 68,097 (Nov. 3, 2011)

[Docket Number: OSHA–2011–0126]

RIN 1218–AC53

The Equal Employment Advisory Council (EEAC) respectfully submits the following comments in response to the Occupational Safety and Health Administration’s Interim Final Rule (IFR) governing the handling of retaliation complaints filed with the agency under § 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A.

Interest of the Equal Employment Advisory Council (EEAC)

EEAC is a national nonprofit association of major employers formed in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC’s membership is comprised of approximately 300 of the nation’s largest private sector companies, collectively providing gainful employment to more than 20 million people in the United States alone. EEAC’s directors and officers include many of the nation’s leading experts in the field of equal employment opportunity. Their combined expertise and experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation of fair employment policies and practices.

Most if not all of EEAC’s member companies are subject to § 806 of the Sarbanes-Oxley Act, and thus are potential respondents to whistleblower complaints filed under the Act. Accordingly, our member companies have a direct interest in how § 806 is administered and enforced.

EEAC acknowledges that OSHA is required to update its § 806 regulations to conform them to changes made to SOX by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111–203, 124 Stat. 1376 (2010). In fact, as discussed in more detail below, we believe the IFR accurately reflects the changes made by Dodd-Frank to the SOX whistleblower procedures, and we commend the agency for this effort.

Nothing in Dodd-Frank, however, directs OSHA to make the additional changes that have been incorporated into the IFR that OSHA states are needed to “clarify and improve the procedures for handling Sarbanes-Oxley whistleblower complaints and ... [to] make the procedures for handling retaliation complaints under Sarbanes-Oxley more consistent with OSHA’s procedures for handling complaints under the employee protection provisions” of several other named whistleblower statutes that are enforced by OSHA.¹

We respectfully submit that many of these changes, rather than clarifying and improving the way in which SOX whistleblower complaints are handled, seem intentionally designed to make it easier for claimants to file and prosecute, and more difficult for respondents to defend, § 806 whistleblower complaints.

Overview

As discussed in more detail below, EEAC’s comments respectfully urge OSHA to revise and/or clarify the Interim Final Rule (IFR) as follows:

- reinstate the requirement that § 806 complaints be in writing and include a full statement of the claim;
- provide that all pertinent information will be made available to the respondent with ample opportunities to respond;
- retain the language that correctly reflects the statutory provision concerning the time for filing a § 806 complaint;
- retain the “security risk” exception to the preliminary reinstatement requirement;
- clarify and expand the “exceptional circumstances” under which a stay of an “order of preliminary reinstatement” may be granted;
- provide additional guidance regarding complaints that are submitted in a foreign language;
- retain the language clarifying that an Administrative Law Judge has the authority to decide a case without a hearing; and

¹ See 76 Fed. Reg. 68,084.

- retain the language stating that a § 806 complainant is not permitted to file a “kickout” action in federal court after the Secretary has issued a final decision.

A more detailed discussion of each of these recommendations follows.

The Final Rule Should Require § 806 Complaints To Be in Writing and Include a Full Statement of the Claim

The original SOX retaliation regulations provided that in order to be properly filed, a complaint had to be in writing, and had to include “a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.”² The IFR replaces this key provision with the statement that a complaint may be either written or oral, and deletes entirely the “full statement” requirement.³

EEAC questions the rationale of eliminating the requirement that a written complaint contain the full details concerning the alleged violation. Requiring a written complaint emphasizes the gravity of invoking federal statutory protection, and thus discourages frivolous complaints, which burden both the agency’s resources and those of the employer.

Further, EEAC respectfully submits that the Supreme Court’s decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), which OSHA cites in support of this change, is not on point, since that decision dealt with the *nature* of the communication allegedly triggering statutory protection, and not with the *form* of the complaint filed with the federal agency to seek relief.

Indeed, another decision by the Supreme Court, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009), in which the Court ruled that any plaintiff bringing a civil action in federal court cannot simply rely on bare legal conclusions, but must provide enough factual content in his or her complaint to establish their claims have “facial plausibility,” supports our recommendation that OSHA retain the requirement of a written complaint under § 806.

The Final Rule Should Provide That All Relevant Information Will Be Made Available to the Respondent and That There Will Be Ample Opportunity To Reply

EEAC is extremely concerned that the IFR has made several changes to the SOX complaint and response procedures that appear intended to increase the amount of information given to the complainant and reduce the amount of information given to the respondent at the investigation stage. As discussed in the previous section, the IFR already has eliminated the requirement for a written complaint accompanied by detailed supporting information, thus making it more difficult for an employer to conduct its own internal investigation into the complaint and prepare its response.

² See 29 C.F.R. § 1980.103(b) (original version).

³ See 76 Fed. Reg. at 68,086.

In addition, the revised § 1980.104(a) now requires OSHA only to provide the named respondents with a copy of the complaint, which under the IFR might be no more than the brief summary of a telephone call reduced to writing.

Similarly, the original regulations required OSHA to notify the employer (and anyone else named in the complaint) “of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint.”⁴ In contrast, the IFR’s new § 1980.104(c) now requires OSHA to provide to the *complainant* copies of anything relevant to the complaint that the employer sends to the agency at any point in the investigation, and to allow the complainant to respond in turn. OSHA justifies this change on the basis that it will aid the agency, both in conducting “full and fair investigations”⁵ and in evaluating the employer’s response.

EEAC respectfully submits that the same logic supports providing the *respondent* with all of the information that the agency obtains from the complainant, both before and during the investigation, so that the employer can conduct its own investigation and respond fully and completely to all of the allegations against it.

To achieve this basic level of fairness, we respectfully request that OSHA retain the language from the former § 1980.104(a) requiring the agency to provide the employer with “the substance of the evidence supporting the complaint.” We also request that OSHA add to the language of the IFR’s new § 1980.104(c) a comparable provision stating that:

Throughout the investigation, the agency will provide to the respondent (or the respondent’s legal counsel if the respondent is represented by counsel) a copy of all information that complainant submits to the agency. Before providing such materials to the respondent, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The agency will also provide the respondent with an opportunity to respond to such submissions.

With regard to OSHA’s stated intent to redact any information in the complaint which it considers to be confidential before the employer gets it, EEAC strongly urges the agency not to withhold any information, such as the identity of potential witnesses that would aid the employer in conducting its own investigation and preparing its defense.

Along the same lines, § 1980.104(e) of the original regulations provided that if OSHA is about to make a reasonable cause finding, it first must provide the employer with the substance of the relevant evidence supporting the complainant’s allegations that was developed during the course of the investigation, and give the employer a last chance to respond. The new regulations retain this provision at § 1980.104(f), but add that OSHA will send the information to the complainant as well. EEAC recommends amending the Final Rule to add that if the complainant

⁴ See 29 C.F.R. § 1980.104(a) (original version).

⁵ See 76 Fed. Reg. at 68,087.

submits new information at this stage, that the employer be given a copy and the opportunity to respond before OSHA makes a final determination on the complaint.

The Final Rule Should Retain the IFR Provision Concerning the Time for Filing a § 806 Complaint

As the preamble to the IFR notes, the 2010 Dodd-Frank amendments to § 806 changed the statute of limitations for filing a § 806 complaint with OSHA from 90 to 180 days from the date the violation occurred or the date on which the employee became aware of the violation. The IFR correctly reflects the statutory change. As the preamble accurately points out, the Supreme Court ruled in *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), that an alleged violation occurs when the adverse employment decision has been made and communicated to the employee in question.

Thus, under § 806, the alleged violation occurs, at the latest, the date on which the employee became aware of the employer’s decision, *e.g.*, the date on which the employer communicated it to the employee. Because the IFR language correctly reflects the Dodd-Frank amendment in this regard, OSHA should retain it in the Final Rule.

The Final Rule Should Reinstate the “Security Risk” Exception

The original regulations at § 1980.105(a)(1) contained an important exception providing that, “[w]here the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant’s discharge), a preliminary order of reinstatement would not be appropriate.”⁶ The IFR deletes this exception.

EEAC urges OSHA to reinstate this “security risk” exception into the Final Rule. The SOX statutory language provides that proceedings under the law “shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code,” the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”).⁷ As OSHA pointed out in the preamble to the original SOX regulations, the security risk exception is consistent with the AIR21 regulations.⁸ Indeed, the original SOX regulations used the same language as the AIR21 regulations, which continue to include the exception.⁹

Nevertheless, the IFR deletes the exception on the basis that OSHA believes the determination of whether preliminary reinstatement is inappropriate should be made on a case-by-case basis, and that the regulations should not contain a blanket exception for a security risk. We respectfully submit that OSHA’s rationale is flawed for two reasons. First, as noted above, § 806 of SOX explicitly requires that proceedings under SOX follow AIR21, which includes the exception. Second, the exception’s precondition that the respondent establish that the complainant is a security risk before the exception can take effect already ensures that the

⁶ See 29 C.F.R. § 1980.105(a)(1).

⁷ See 18 U.S.C. § 1514A(b)(2)(A).

⁸ See 69 Fed. Reg. 52,104, 52,108 (Aug. 24, 2004).

⁹ See 29 C.F.R. § 1979.105(a)(1).

determination will indeed be made on a case-by-case basis; in other words, it is not, as OSHA claims, a blanket exception.

EEAC thus respectfully submits that the Final Rule should reinstate the “security risk” exception as contained in the original regulations.

The Final Rule Should Clarify and Expand the “Exceptional Circumstances” Under Which a Stay of an Order of Preliminary Reinstatement Can Be Granted

The original SOX regulations at § 1980.106(b) provide that if OSHA concludes, following an investigation, that there is reasonable cause to believe that a company violated SOX, it will issue an order providing relief to the complainant. If the employer terminated or demoted the complainant, the order will include reinstatement to a position with the same seniority status as the complainant’s prior job. The reinstatement order takes effect as soon as the employer receives it. The regulations provide further that the employer then has 30 days to file objections to the order with a DOL Administrative Law Judge (ALJ). If the employer objects to preliminary reinstatement, it has to ask the ALJ separately for a stay of the reinstatement order during the administrative appeal process.

The IFR retains this language in § 1980.106(b), but also adds language stating that the employer’s request for a stay of the preliminary reinstatement order “shall be granted *only based on exceptional circumstances.*” (emphasis added). The IFR also includes the addition of this phrase in § 1980.110(b), which covers appeals to the Administrative Review Board (ARB).

The preamble to the IFR states that the “exceptional circumstances” language has been added “because the Secretary believes that a stay of the Assistant Secretary’s preliminary order of reinstatement under Sarbanes-Oxley would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favors a stay.”¹⁰

In EEAC’s view, use of the term “exceptional circumstances” implies a limitation far narrower than OSHA says that it intends. We recommend at minimum that the above language from the preamble be included in the Final Rule, so that § 1980.106(b) would read “The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary’s preliminary order of reinstatement, which shall be granted only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favors a stay.” Similarly, the Final Rule should amend § 1980.110(b) in like manner.

In addition, there may be situations in which the complainant does not desire reinstatement, preliminary or otherwise. The Final Rule should state explicitly that an order of preliminary reinstatement may be granted by agreement of the parties.

¹⁰ See 76 Fed. Reg. at 68,089.

The Final Rule Should Include Guidance Regarding Complaints Submitted in a Foreign Language

In addition to now allowing oral complaints, the IFR also provides at § 1980.103(b), without any further explanation, that if the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. The agency offers no guidance on by whom, if at all, the complaint will be translated into English, how the respondent can submit its own translation for the agency’s consideration, or how contradictions in translation will be resolved.

EEAC assumes that OSHA, for its own purposes in pursuing the investigation, will have the complaint and any accompanying information that is submitted in a foreign language translated into English by a qualified translator. We respectfully recommend that the Final Rule make clear that in this situation, OSHA will provide to the employer *both* the original and translated versions. In addition, OSHA should consider, as part of the employer’s response, a different translation obtained by the employer from a qualified translator, and attempt to resolve any contradictions.

The Final Rule Should Contain the IFR’s Clarification That an ALJ May Decide a Case Without a Hearing

The IFR has added language to § 1980.109(c) clarifying that an ALJ has the discretion to decide a case without a hearing where the facts and circumstances justify that result. EEAC strongly supports this helpful change. The addition is consistent with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18.40(d). Moreover, as the Supreme Court has said in the context of the Federal Rules of Civil Procedure, “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”¹¹

Indeed, the authority to decide a case without a hearing appropriately reduces the workload of the ALJs by allowing them to decide summarily those cases in which a hearing is unnecessary. Inclusion of this point in the SOX procedural regulations properly confirms the ALJ’s authority to grant a motion for dismissal or a motion for summary decision.

The Final Rule Should Incorporate the Language From the IFR’s Preamble Regarding “Kickout” Actions

Last but not least, the preamble to the IFR states that “It is the Secretary’s position that complainants may not initiate an action in Federal court after the Secretary issues a final decision, even if the date of the final decision is more than 180 days after the filing of the complaint.”¹² EEAC not only supports this statement, but also recommends that it be incorporated into the Final Rule at § 1980.114(a).

¹¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations omitted).

¹² See 76 Fed. Reg. 68,091.

Conclusion

EEAC appreciates the opportunity to comment as OSHA updates its regulations on the procedures for the handling of retaliation complaints under Section 806 of SOX. Please feel free to contact us if you have any questions, or if we can provide any additional information.

Respectfully submitted,

A handwritten signature in black ink that reads "Jeffrey A. Norris". The signature is written in a cursive style with a large initial "J".

Jeffrey A. Norris
President