

## **Filing a Complaint at the DOL**

### **The Complaint:**

If you believe you were discriminated against for whistleblowing in violation of either the Sarbanes Oxley Act (SOX) or the Dodd-Frank Wall Street Reform Act, you should consider filing a complaint with the Occupational Safety and Health Administration (OSHA) within the US Department of Labor. You have 180 days after you receive notice of an adverse action. There are circumstances that could extend that time, but it is unwise to expect any extensions.

The complaint must be filed in writing. It should include a full statement of the facts and pertinent dates related to the violation of your rights that you are alleging. The complaint should include your full name, address and phone number, and the name, address and phone number of the employer. You should include full documentation for your allegations, including notice of adverse action, performance appraisals, compensation records, related grievances, job descriptions, employment contracts, and relevant personnel policies.

You should also identify the applicable statutes for your claim and list any other agency to which you have filed the complaint, such as the Securities and Exchange Commission (SEC). The complaint should provide a summary of your experience which addresses the factors that prove a prima facie case—namely that you have engaged in some legally protected activity, your employer knew of your activity, and took action against you for engaging in it.

### **Pre-Investigation:**

OSHA will examine your complaint and documentation and determine whether the circumstances are sufficient to infer that the protected activity that you engaged in was a contributing factor to the unfavorable action taken against you. If the agency decides there is not such a showing, there will not be an investigation and the case will be closed. If there is a prima facie case, the agency will begin an investigation but might conclude it if the employer can show by “clear and convincing” evidence that it would have taken the same unfavorable action against you even in the absence of your activity.

Upon receipt of the complaint, the OSHA office may contact you for additional information or documents. If there are problems with the submission, an officer will explain why the case will not proceed to an investigation. You can ask to withdraw the complaint before it is docketed and a written determination is issued which is routinely granted.

After this initial screening, your complaint will be docketed. OSHA will notify your employer in writing about the complaint and its intention of investigating the claim. The allegations and evidence in your complaint will be summarized and your employer will be given 20 days to

answer and request a meeting during those 20 days. A copy of the complaint will also be sent to the SEC.

### **Investigative Stage:**

An OSHA investigation can take anywhere from 60 days to several years. The investigator will interview you and ask for the address and phone numbers of witnesses, and a description of what they can offer. He will grant confidentiality to those who request it. Witnesses are allowed to have a representative or attorney with them. The investigator will also interview the employer, and may contact you to help resolve discrepancies.

After completing the investigation, the investigator will evaluate the evidence, draw conclusions, and share those with his supervisor and Department of Labor lawyers. He will have a close-out interview with you in person or by phone to answer your questions about his determinations and next steps, including your right to appeal or object, and the time limits for filing that appeal.

The investigator will write a final investigation report for his supervisor describing and weighing the evidence, describing the close-out interview with you, and making recommendations. The supervisor will accept the recommendation and prepare the appropriate paperwork or request further investigation. Copies of the complaint and resulting determination will be sent to the SEC and the Office of Administrative Law Judges.

### **Findings and Preliminary Orders:**

If the Department of Labor finds on your behalf, the assistant secretary may issue a preliminary order for your employer or former employer to make you whole, including reinstatement, back pay with interest, compensation for special damages, and reasonable attorney fees. The order will take effect 30 days after receipt by the employer. Either side may file objections and seek a hearing by an administrative law judge. The objection will stay all aspects of the preliminary order except for reinstatement. Reinstatement is enforceable immediately in federal district court and cannot be stayed, unless the employer can demonstrate that the employee is a security risk.

If there are no objections to the findings and preliminary order, it will become the final agency decision of the Secretary of Labor, and is not subject to judicial review.

### **Administrative Hearing:**

Upon objection of either party, the chief administrative law judge will notify you and your employer of the date, time and place of a hearing, which is to be held within 60 days. An administrative law judge has all the powers necessary to conduct a full and impartial hearing, order the production of documents and appearance of witnesses, and issue decisions and orders.

### **Review and Appeal:**

Either party to the proceeding can petition for a review of a final decision of the administrative law judge within ten business days, or it becomes final. The petition should specify the findings, conclusions or orders to which exception is being taken. The Administrative Review Board (ARB) of the Department of Labor will review such petitions and make a final determine for the Secretary of Labor or order the administrative law judge to reexamine the case. Either party can appeal a final order of the ARB within 60 days to the U.S. Court of Appeals for the circuit where the violation allegedly occurred. Federal appeal judges must give some judicial deference to final agency decisions.

**Important Note: Appeal to Federal District Court for a Jury Trial**

During the Department of Labor process, if you have not received a final decision within 180 days and have not done anything to cause a delay, you have the right to file suit in federal district court in the district where the violation occurred. You should strongly consider requesting a jury trial. You have to provide 15-day notice of your intention to file suit in federal district court and serve that upon the assistant secretary for OSHA.

The decision whether to leave the Department of Labor process and file suit in federal district court should be thoroughly examined. Federal district court is a far more expensive process. Federal judges are less knowledgeable about the whistleblower laws. Jurors tend to be sympathetic to whistleblowers but are also unpredictable. The judges on the ARB are notable for their knowledge and have a reputation for fairness.