

**DEPARTMENT OF LABOR****Occupational Safety and Health Administration****29 CFR Part 1980**

RIN 1218 AC10

**Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002****AGENCY:** Occupational Safety and Health Administration, Labor.**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This document provides the text of regulations governing the employee protection ("whistleblower") provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "Act"), enacted on July 30, 2002, to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. This rule establishes procedures and time frames for the handling of discrimination complaints under Title VIII of Sarbanes-Oxley, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration ("OSHA"), investigations by OSHA, appeals of OSHA determinations to an administrative law judge ("ALJ") for a hearing *de novo*, hearings by ALJs, appeals of ALJ decisions to the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary's final decisions.

**DATES:** This interim final rule is effective on May 28, 2003. Comments on the interim final rule are due on or before July 28, 2003.

**ADDRESSES:** Submit written comments to: OSHA Docket Office, Docket No. C-09, Room N-2625, U.S. Department of Labor—OSHA, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card or to submit them by certified mail, return receipt requested. As a convenience, comments may be transmitted by facsimile ("FAX") machine to (202) 693-1648 (not a toll-free number) or by electronic means through the Internet at <http://www.ecomments.osha.gov>. All comments should reference docket No.

C-09. If commenters transmit comments by FAX or through the Internet and also submit a hard copy by mail, please indicate on the hard copy that it is a duplicate copy of the FAX or Internet transmission.

**FOR FURTHER INFORMATION CONTACT:** John Spear, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3610, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2199. This is not a toll-free number. The alternative formats available are large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

**SUPPLEMENTARY INFORMATION:****I. Background**

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), Public Law No. 107-204, was enacted on July 30, 2002. Title VIII of Sarbanes-Oxley is designated as the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, codified at 18 U.S.C. 1514A, provides protection to employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies, because the employee provided information to the employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation. These rules establish procedures for the handling of discrimination complaints under Title VIII of Sarbanes-Oxley. In drafting these regulations, consideration has been given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), codified at 29 CFR 1979, the Surface Transportation Assistance Act ("STAA"), codified at 29 CFR part 1978, and the Energy Reorganization Act ("ERA"), codified at 29 CFR part 24, where deemed appropriate.

**II. Summary of Statutory Provisions**

The Sarbanes-Oxley whistleblower provisions provide that a covered employee may file, within 90 days of the alleged discrimination, a complaint with the Secretary of Labor ("the Secretary").<sup>1</sup> The statute requires the Secretary to notify the person named in the complaint and the employer of the filing of the complaint. The statute further provides that proceedings under Sarbanes-Oxley will be governed by the rules and procedures and burdens of proof of AIR21, 49 U.S.C. 42121(b). These rules and procedures are described below in Section III.

Sarbanes-Oxley authorizes an award to a prevailing employee of make-whole relief, including reinstatement with the same seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney's fees. 18 U.S.C. 1514A(c)(2). If the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that there has been delay due to the bad faith of the claimant, the claimant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy.

**III. Summary of Procedures**

These rules and procedures provide that upon receipt of a complaint, the Secretary must give written notice to both the person named in the complaint who is alleged to have violated the Act and the employer (if the complainant did not allege that the employer violated the Act) of the allegations contained in the complaint, the substance of the evidence submitted with the complaint, and the rights of the named person throughout the investigation. The person named in the complaint and the employer are defined collectively in the regulations and referred to collectively throughout this preamble as "the named person." The Secretary must then, within 60 days of receipt of the complaint, afford the named person an opportunity to submit a response and

<sup>1</sup> Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Secretary's Order 5-2002, 67 FR 65008 (Oct. 22, 2002). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board. Secretary's Order 1-2002, 67 FR 64272 (Oct. 17, 2002).