

THE FREDERICK HR MANAGER AND SARBANES-OXLEY

By Thomas Gill

Just when you thought you had learned about all the employment laws, along comes a new one. If you watch the news, you know that Sarbanes-Oxley (SOX) is a broad law designed to make companies who sell stock more honest. It includes accounting and public disclosure provisions. None of the news reports I heard mentioned new employee protections, but watch out. Sarbanes-Oxley contains a big one.

Generally SOX applies to publicly traded companies. You might be surprised to know that some HR managers don't know whether their companies are publicly traded. If you work for a wholly owned subsidiary, the top management in the parent may not think you need to know. Snooping will usually work. How much caution you should exercise is up to you.

If your company is publicly traded, you are forbidden to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee..." who is a whistleblower. Notice that you can not harass. Don't call the employee's wife or best friend and ask why he blew the whistle. This is really tough language.

What is whistle blowing? It is providing information, causing information to be provided, or otherwise assisting in the investigation of conduct which the employee reasonably believes constitutes a violation of:

- 18 U.S.C. 1341 (Fraud)
- 18 U.S.C. 1343 (Mail Fraud)
- 18 U.S.C. 1344 (Bank Fraud)
- 18 U.S.C. 1348 (Securities Fraud)

Fraud is a complicated legal concept, but here is the simple example. I show you a bag with something kicking inside. I tell you it is a pig. You give me \$500. When you open the bag it is a bear. Hence the saying, "Never buy a pig in a poke."

Employee lawyers have discovered this statute. Here is just one example of the creative use of SOX. An employee sees a 50 gallon drum being buried in a land fill area. He thinks the drum might contain toxic waste (in fact, it is empty). He reports the sighting to his supervisor. A week later he is fired for absenteeism. This is a complaint an employee and his lawyer actually took to OSHA. The theory is that covering up toxic waste dumping causes the value of the property to be overstated so the balance sheet is fraudulently inflated. Isn't that clever?

If OSHA finds probable cause to believe there was a violation, OSHA can order reinstatement and back pay **before** a hearing. News reporters say that foreign corporations have avoided listing their stock on the NYSE because of this provision.

If this isn't bad enough, there is one more twist. SOX forbids both employers and "any officer, employee, contractor, subcontractor, or agent..." from retaliating. SOX at 18 U.S.C. 1513 goes on to say, "Whosoever knowingly, with intent to retaliate, takes any action harmful to any person... for providing to a law enforcement officer [read OSHA investigator, etc.] any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both. That kind of gets your attention, doesn't it?"

At this point, you may be looking for advice. As with any new law, the best advice is keep your head down. Hasty or emotional termination decisions are the ones that produce bad results in court three years later. When you meet with a supervisor, you already have a check list: Race? Age? Sex? Religion? National Origin? and so on. You should add whistle blowing. "Do you have any reason to believe the employee complained to you, OSHA, or anyone about anything at the company?" If the answer is yes, you may need legal advice. Be especially careful with whistle blowing over the next few years while the courts are working out the kinks.