Whistleblower Litigation
ALI-ABA: Advanced Employment Law and Litigation - 2012

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I. SARBANES-OXLEY WHISTLEBLOWER PROTECTION

A. Introduction

One of the most widely discussed federal whistleblower statutes is the anti-retaliation provision contained in Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX 806"), 18 U.S.C.A. § 1514A, that protects certain whistleblowers who report corporate fraud and financial or securities-related wrongdoing. SOX 806 provides a cause of action to employees of publicly-traded companies and certain of their subsidiaries who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they:

> reasonably believe[d] constitute[d] a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A(a)(1).

The "investigation" prong of SOX 806 protects those who provide, or cause to be provided, information or otherwise participate in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of specified federal securities and fraud law. 18 U.S.C.A. § 1514A(a)(1). The information or assistance must have been provided to, or the investigation must be conducted by: (1) a federal regulatory or law enforcement agency; (2) a member of Congress or any committee of Congress; (3) a person with supervisory authority over the employee; or (4) a person working for the employer who has the authority to investigate, discover, or terminate the misconduct. Id.

The "proceedings" prong protects those who file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed, relating to an alleged violation of federal securities and fraud laws. 18 U.S.C.A. § 1514A(a)(2). The Department of Labor has historically interpreted "proceedings" broadly to encompass internal reports to management, and potentially employee leaks to the media, on the grounds that such contacts were a "preliminary step" toward causing a proceeding to be filed or initiated.

Section 929A of the Dodd-Frank Act expands the scope of SOX coverage to include certain subsidiary entities of publicly-traded corporations. Specifically, the statute expands coverage to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of [a publicly-traded company]." Prior to the enactment of the Dodd-Frank Act, employers frequently avoided the application of SOX's employee protection provisions by arguing that they were not a covered entity under SOX. As of April 15, 2009, 1,400 Sarbanes-Oxley claims have been filed with OSHA. Of these, employees prevailed in 230 cases (including 210 cases that settled), employers prevailed in 930 cases, and 186 complaints were voluntarily withdrawn.[2]

B. Covered Employers

1. Companies

SOX whistleblower provisions apply to publicly-traded companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78l, or that are subject to the periodic reporting requirements of Section 15(d) (*e.g.*, required to file forms 10-K and 10-Q). 15 U.S.C. § 78o(d); see 18 U.S.C. 1514A(a), as well as to their subsidiaries whose financial information are consolidated into their financial statements.

a. Domestic

The Act applies to all companies that have obtained a listing in the United States or have registered securities with the SEC. However, coverage under the whistleblower provisions is narrower than coverage under Section 402 (enhanced conflict of interest provisions) of SOX in that it does not cover companies that have filed a registration statement but do not yet have a class of securities registered under Section 12 or report under Section 15(d) of the Exchange Act. See Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004) (granting summary decision to employer where it had filed a registration with the SEC but withdrew it prior to SEC approval).[3]

The requirement that a respondent be subject to the registration or reporting requirements of the Exchange Act has been strictly construed. For example, in Flake v. New World Pasta Co., ARB No. 03-126, ALJ No. 2003-SOX-18 (ARB Feb. 25, 2004), an ALJ addressed the issue of whether the respondent was a company subject to jurisdiction under Section 806. It was undisputed that the respondent had no publicly-traded securities. Therefore, the only issue was whether it was required to file reports under Section 15(d) of the Exchange Act. The ALJ found that the respondent fell within an exception to reporting requirements of Section 15(d) because its public debt had been held by less than 300 persons in each year since its registration and offering. According to the ALJ, the fact that the respondent voluntarily filed some reports required by Section 15(d) in order to comply with a contractual agreement did not transform it into an issuer "required to" make such filings. Therefore, the ALJ granted the respondent's motion for summary decision. See also SEC Division of Corporation Finance, Sarbanes-Oxley

[2] Laurence S. Moy, et al., Understanding the Securities Laws 2010: Whistleblower Claims Under the Sarbanes-Oxley Act of 2002, 1843 PLI/Corp149, 152 (2010).

[3] The ALJ in Roulett also held that SOX could not apply retroactively to cover an employer for actions undertaken prior to approval of the registration of its securities by the SEC, even if the company was subject to SEC registration requirements at the time the SOX complaint was filed with the Department of Labor.

Act of 2002 – *FAQ #1* (Nov. 8, 2002) (company that voluntarily files reports under the Exchange Act but is not required to because it had fewer than 300 security holders of record at the beginning of its fiscal year is not an "issuer" within the meaning of SOX).

In Stevenson v. Neighborhood House Charter Sch., 2005-SOX-87 (ALJ Sept. 7, 2005), complainant argued that respondent, a non-publicly-traded charter school, should be covered under Section 806 because it was subject to reporting under SEC Rules 10b5 and 15c2-12, had a retirement plan with benefits subject to reporting and disclosure requirements under ERISA, and received funds from public companies. The ALJ rejected these arguments, reasoning that whether or not a company is covered by Section 806 "is determined solely by whether the company has a class of stock registered under Section 12 of the [Exchange Act] or whether it is required to make reports pursuant to Section 15(d)." See also Paz v. Mary's Center for Maternal & Child Care, ARB No. 06-031, ALJ No. 2006-SOX-7 (ARB Nov. 30, 2007) (dismissing complaint against non-profit health organization which neither had a class of securities registered under Section 12 of the Exchange Act nor was required to file reports under Section 15(d)), aff'd, ARB No. 06-031 (ARB Nov. 30, 2007); Fiedler v. Compass Group USA, Inc., 2005-SOX-38 (ALJ July 15, 2005); Gibson-Michaels v. Federal Deposit Ins. Corp., 2005-SOX-53 (ALJ May 26, 2005) (FDIC is not a covered employer under Section 806); Weiss v. KDDI America, Inc., 2005-SOX-20 (ALJ Feb. 11, 2005); Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004) (respondent not covered under Section 806 where it withdrew its registration before any approval by an exchange or the SEC was effected and, therefore, never registered a class of securities under Section 12); Ionata v. Nielsen Media Research, Inc., 2003-SOX-29 (ALJ Oct. 2, 2003) (ALJ lacked jurisdiction because the respondents were not companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934").

Consistent with this strict construction of the requirement that the respondent be subject to the registration or reporting requirements of the Exchange Act, an ALJ in Gallagher v. Granada Entertainment USA, 2004-SOX-74 (ALJ Apr. 1, 2005), found no liability where the employer was not subject to the requirements of Sections 12 or 15(d) at the time the adverse employment action was taken. The ALJ reasoned that the adverse action occurred on January 22, 2004, but the company did not become subject to Section 12 until after a merger on February 2, 2004.

b. Foreign

The SOX whistleblower protections apply to foreign private issuers (as defined by Rule 36-4(c) of the Exchange Act) subject to SEC reporting and registration obligations. Foreign issuers that are exempt from SEC filing requirements under Rule 12g3-2(b) of the Exchange Act are excluded from coverage under SOX. Foreign corporations doing business in the United States are subject to Section 806 whistleblower provisions because SOX applies to companies "with a class of securities registered under § 12 of the Securities Exchange Act" . . . or "required to file reports" under the Exchange Act.

Statutory whistleblower provisions generally do not apply extraterritorially absent clear language by Congress in the statute to extend the statute's protections abroad. See, e.g., EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Mendonca v. Tidewater, Inc., 2001 U.S. Dist. LEXIS 3486, at *7 (E.D. La. Mar. 4, 2001). Courts have held that U.S. courts do, in certain circumstances, have jurisdiction over violations of the Exchange Act, even if the the violations took place outside the U.S. See, e.g., Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336-37 (2d Cir. 1972) (statute applicable when foreigner made substantial misrepresentations in the United States for transactions executed in England); Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968). In its Final Rule, OSHA declined to clarify this issue, despite requests by commentators to do so, on the ground that the purpose of the regulations is procedural and not to interpret the statute. 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004). Additionally, one ALJ decided that a corporation registered only on European stock exchanges with securities exempt from SEC registration under Rule 12g3-2(b) is not covered by SOX, nor are its subsidiaries. Deutschmann v. Fortis Investments, 2006-SOX-80 (ALJ June 14, 2006).

The primary issue in addressing an international SOX claim is whether the claim raised an extraterritorial question. If a court determined that the complaint required the extraterritorial application of SOX, the claim was dismissed. See Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006). Carnero involved a complainant who was an Argentinean citizen resident in Brazil working for two Brazilian subsidies of an American corporation. Id. The court noted that there is a well-established presumption in statutory construction against the extraterritorial application of congressional statutes in the absence of clear evidence that Congress intended the law to reach abroad. The Carnero court held that the legislative history of SOX and its plain language did not suggest extraterritorial application. Thus, where the complainant was a foreign citizen working abroad who was employed and paid by the foreign subsidiary, whose primary employment duties were performed outside the United States, and whose complaint was instituted outside the United States, the court held that SOX did not apply. Id.; see also Ede v. The Swatch Group Ltd., ARB No. 05-053 (ARB June 27, 2007) (dismissing complaints where complainants worked solely for foreign subsidiaries and never in the U.S. and where the SOX complaint was grounded in adverse actions that occurred outside the U.S.); Pik v. Goldman Sachs Group, Inc., 2007-SOX-92 (ALJ Feb. 21, 2008) (same); Concone v. Capital One Financial Corp., 2005-SOX-6 (ALJ Dec. 3, 2005) (same).

In a 2008 case that cited Carnero, the Administrative Review Board ("ARB") granted summary judgment to defendant company where defendant asserted that the complainant was: (1) a resident of India; (2) directly employed by a United Kingdom-based company; (3) operating out of Dubai, U.A.E.; (4) who performed no work in the United States. See Salian v. Reedhycalog UK, ARB No. 07-080, ALJ No. 2007-SOX-20 (ARB Dec. 31, 2008). The ARB found that complainant's production of documents mentioning both him and his direct employer's U.S. parent was insufficient to raise a question of material fact as to whether he worked for a covered employer. Id.

The Carnero court noted, however, that its holding was fact-specific; i.e., similar facts might not implicate extraterritorial statutory application. Indeed, in an earlier case that cited the lower court's decision in Carnero, Penesso v. LLC International, Inc., 2005-SOX-16 (ALJ Mar. 4, 2005), the ALJ denied summary decision and distinguished Carnero, finding that the case "ha[d] a substantial nexus to the United States, and it [was] appropriate for the complainant to bring this claim under § 1514A of the Sarbanes-Oxley Act." In Pennesso, the complainant was employed in Italy by the Italian subsidiary of a U.S. corporation headquartered in Virginia. Id. The ALJ considered, inter alia, that much of the protected activity occurred in the U.S. when the complainant came to respondent's U.S. headquarters to inform corporate officers of the financial improprieties he believed were taking place in Italy, the complainant was a U.S. citizen, and at least one of the retaliatory actions was taken in the U.S. Id. The court in Neuer v. Bessellieu, 2006-SOX-132 (ALJ Dec. 5, 2006), also distinguished Carnero based on the specific facts presented. In Neuer, a non-U.S. citizen engaged in protected activity in Israel against a publicly-traded company located there. Id. Nevertheless, the ALJ found distinctions from Carnero that led it to deny the respondent's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Specifically, the court cited the following facts as a basis for denying the motion: the complainant was employed full-time in the U.S. by a wholly owned subsidiary conducting business in the U.S.; the alleged adverse personnel action occurred in North Carolina; and a visa application indicated that the parent and subsidiary had significantly intermingled business activities. Id.

Since Penesso and Neuer, courts and the DOL continued to apply SOX 806 to overseas employees provided that the facts did not require the extraterritorial application of SOX. In O'Mahony v. Accenture Ltd., No. 1:07-CV-07916 (S.D.N.Y. Feb. 5, 2008), for example, the district court held that the extraterritorial application of SOX 806 was not implicated where an employee working in France was an employee of a U.S. subsidiary, the alleged fraud occurred in the U.S., and the alleged retaliatory conduct occurred in the U.S. In deciding whether the case required the extraterritorial application of SOX, the court used a two-factor test: (1) whether the wrongful conduct occurred in the U.S.; and (2) whether the wrongful conduct had a substantial adverse effect in the United States or upon U.S. citizens.

In Walters v. Deutsche Bank, et al., 2008-SOX-70 (ALJ Mar. 20, 2009) the ALJ held that SOX could in some cases apply to employees who work abroad. In Walters, the employer argued that an employee who worked in Switzerland was not covered by the law because SOX does not apply extraterritorially. Following the reasoning of O'Mahony v. Accenture, the ALJ held that because the employee had alleged that he spent some time working in the United States, that the decision to retaliate and the protected activity occurred in the United States, and that the underlying securities law violations harmed U.S. shareholders, the fact that he also worked abroad did not bar application of the statute. In reaching this conclusion, the ALJ did not hold that SOX applies extraterritorially. Instead, the ALJ held that the case did not require extraterritorial application of the law because "all elements essential to establishing a prima facie violation of Section 806 allegedly occurred in the United States." Walters, slip op. at 41.

2. Subsidiaries

Section 929A of the Dodd-Frank Act expands the scope of SOX coverage to include subsidiary entities of publicly-traded corporations "whose financial information is included in the consolidated financial statements of [publicly-traded companies]." Prior to the enactment of the Dodd-Frank Act, employers frequently avoided the application of SOX's employee protection provisions by arguing that they were not a covered entity under SOX. With the exception of certain limited circumstances, the Department of Labor consistently interpreted SOX's whistleblower protection provisions to apply solely to publicly traded companies subject to the registration and reporting requirements of the Securities Exchange Act of 1934. Because of this restrictive interpretation that arguably contravened the plain language of SOX, wholly-owned subsidiaries of publicly-traded companies – entities that are not subject to the registration and reporting requirements of the Securities Exchange Act – frequently avoided liability under SOX in instances of unlawful retaliation.

Section 929A of the Dodd-Frank Act corrects this restrictive interpretation of SOX coverage and ensures that the anti-retaliation provisions of Section 806 of SOX apply to employees of publicly-traded companies and to employees of subsidiaries of publicly-traded companies whose financial information is incorporated into the consolidated financial statements of a publicly-traded company. Accordingly, employers falling under this latter category can no longer avoid coverage of SOX merely because they do not file directly with the SEC.

In the recent case of Johnson v. Siemens Building Technologies, Inc., ARB No. 08-032, ALJ No. 2005-SOX-15 (ARB Mar. 31, 2011) (en banc), the ARB found that this amendment was simply a "clarification" of existing law, and thus need not be given retroactive effect in order for Section 806 to apply to subsidiaries in pre-amendment cases. Id. at 15-16; see also Mara v. Sempra Energy Trading, LLC, ARB No. 10-051, ALJ No. 2009-SOX-018, 2011 WL 261435, at *5-6 (following Johnson and reversing the ALJ's holding that Sempra was not a covered company). This interpretation of the amendment was consistent with the Senate Committee Report on the Dodd-Frank Act, which indicated that the new law:

> … amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This *clarification* would eliminate a defense now raised

in a substantial number of actions brought by whistleblowers under the statute.

S. REP. No. 111-176, at 114 (2010) (emphasis added).

Previously, the Act's retaliation provisions had only sometimes been applied to private subsidiaries of publicly traded companies. See, e.g., Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004) ("covered employee" where the officers of a publicly traded parent company had the authority to affect the employment of the employees of the subsidiary); Platone v. Atlantic Coast Airlines Holdings Inc., 2003-SOX-27 (ALJ Apr. 30, 2004) (employee of a non-publicly traded subsidiary was a covered "employee" where the company's parent was the alter ego of the subsidiary and the ability to affect the complainant's employment).[4] As noted above, however, the DOL and courts often dismissed SOX complaints because the whistleblower worked for a subsidiary. See Savastano v. WPP Group, PLC., 2007-SOX-34 (ALJ July 18, 2007) (employee not covered where complaint did not allege facts supporting a finding that the non-publicly traded employer and its non-publicly traded holding company were acting as agents of a publicly traded parent company).

The pre-Dodd-Frank period produced a number of interesting cases addressing the applicability of Section 806 to subsidiaries of publicly traded companies. See, e.g., Klopfenstein v. PCC Flow Technologies, Inc., ARB No. 04-149, 2004-SOX-11 (ARB May, 31, 2006) (applying agency theory to find application to subsidiary would be likely on remand to ALJ); Walters v. Deutsche Bank, et al., 2008-SOX-70, slip op. at 23 (ALJ Mar. 23, 2009) (structure and purpose of SOX requires application to "all employees of every constituent part of the publicly traded company, including subsidiaries and subsidiaries of subsidiaries which are consolidated on its balance sheets, contribute information to its financial reports, are covered by its internal controls and the oversight of its audit committee, and subject to other Sarbanes-Oxley reforms imposed upon the publicly traded company"). With the Dodd-Frank Act's "clarification" of this issue, it is now clear that Section 806 applies to subsidiaries without resort to arguments based on theories of agency, integrated employer, intertwined entities and the like.

3. Agents/Contractors

SOX whistleblower provisions cover not only publicly traded companies and employees of subsidiaries of publicly-traded companies whose financial information is incorporated into the consolidated financial statements of a publicly-traded company but also "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C.A. § 1514A(a). Therefore, private companies that are not publicly traded, as well as other entities or individuals, that serve as "agents" or "contractors" of the publicly-traded employer or its subsidiaries, may be subject to

[4] A subsequent ARB decision did not reach the corporate identity issue and instead dismissed the complaint on a finding that Platone had not engaged in protected activity. Platone v. FLYi, Inc., ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006).

the whistleblower provisions. OSHA specified, for example, that a small accounting firm acting as a contractor of a publicly-traded company could be liable for retaliation against an employee who provides information to the SEC regarding a violation of SEC regulations (e.g., accounting irregularities). OSHA Whistleblower Investigations Manual (2011), at 14-3 ("OSHA Manual").

The scope of contractor or agent coverage also has generally been limited to cases where the complainant was employed by the publicly-traded company, not by the agent or contractor. A very recent First Circuit decision, Lawson v. FMR, LLC, --- F.3d ---, 2012 WL 335647 (Feb. 3, 2012), held that only employees of public companies are protected by the whistleblower provisions, not employees of a contractor or subcontractor to a public company who engage in protected activity. Id. at *5-6. The court determined that the "any officer, employee, contractor, subcontractor, or agent" language referred "to who is prohibited from retaliating or discriminating, not to who is a covered employee." Id. at *5. This holding is consistent with older ALJ and ARB decisions. See, e.g., Minkina v. Affiliated Physician's Group, ARB No. 05-074, ALJ No. 2005-SOX-19 (ARB July 29, 2005) (concluding that although a privately held entity could engage in discrimination prohibited by Section 806 with regard to an employee of a publicly-traded company when acting in the capacity as an agent of the publicly-traded company, Section 806 does not protect employees of the privately-held contractors, subcontractors, and agents from discrimination); Goodman v. Decisive Analytics Corp., 2006-SOX-11 (ALJ Jan. 10, 2006) (employee of a private contractor or subcontractor of a publicly-traded company is not afforded SOX whistleblower protection). However, while consistent with those decisions, the DOL has consistently taken the opposite position, see, e.g., Brief for the Secretary of Labor as Amicus Curiae in Support of Plantiff-Appellees, Lawson v. FMR, LLC, , --- F.3d ---, 2012 WL 335647 (Feb. 3, 2012) (No. 10-2240); OSHA Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 76 Fed. Reg. 68084, 68086 (Nov. 3, 2011) ("The definitions in this section also continue to reflect OSHA's longstanding position that the statute protects both employees of publicly traded companies and employees of contractors, subcontractors, and agents of publicly traded companies."), and the ARB's more recent decisions (preceding Lawson) have shifted. See e.g., Charles v. Profit Management, ARB No. 10-071, ALJ No. 2009-SOX-040, at 6-7 (ARB No. Dec. 16, 2011) (reversing ALJ's holding that employee of a contractor was not covered by SOX because there were factual issues in dispute as to plaintiff's employment and the nature of the contractual relationship between the private and public employer companies); Johnson v. Siemens Bldg. Techs., Inc., ARB No. 08-032, ALJ No. 2005-SOX-015, at 22 (ARB Mar. 31, 2011) ("Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies.").

SOX, however, might be found to apply to publicly-traded companies for acts committed by them against employees of their agents or contractor where the respondent publicly-traded company acts as the employer with regard to the complainant. See, e.g., Kalkunte v. DVI Financial Services, Inc., ARB Nos. 05-139, 05-140, 2004-SOX-56 (ARB Feb. 27, 2009); Stephenson v. NASA, ARB No. 98-025 (July 18, 2000) (dismissing case on factual grounds).

Lawson did not address a situation where the respondent publicly-traded company acted as the employer of the contractor's employee. See Lawson, 2012 WL 335647, at *1-2.

4. Individual Liability.

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" could be construed as providing for individual liability for wrongful retaliation. This conclusion is supported by the summary and discussion in the Final Rule, which provides "the definition of 'named person' will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action." 76 Fed. Reg. 68084, 68086 (Nov. 3, 2011).

The first decision to address this issue under SOX found that Section 806 does provide for individual liability. In Gallagher v. Granada Entm't USA, 2004-SOX-74 (ALJ Oct. 19, 2004), an ALJ, citing the above Federal Register quote, permitted amendment of the complaint to add as respondents the executives who terminated the complainant's employment. However, the ALJ rejected complainant's effort to join "any person or business entity . . . whose acts in concert with or at the direction of the Employer . . . lead to" his termination. The ALJ reasoned that "[o]nly individuals who were Complainant's superiors . . . could discriminate against him 'in the terms or conditions of his employment' . . . ." The ALJ concluded that "[t]he availability of damages does not convert this statutory proceeding into a common law tort action, permitting joinder of persons or entities who were not the Complainant's superiors as if they were joint tortfeasors."

Then in Jordan v. Sprint Nextel Corp., 2006-SOX-41 (ALJ Mar. 14, 2006), the ALJ denied the named company's motion to dismiss three individually named respondents. The ALJ noted that SOX expressly provides for liability of officers of the company named in the complaint, and that the complainant in this case had named three officers in the complaint filed with OSHA. Sprint argued that because OSHA failed to name or serve the three officers in its investigation and findings, the officers could not properly be respondents before the ALJ. The ALJ rejected this argument, holding that OSHA's failings in this regard were not attributable to the complainant, who had adequately identified the three officers in his OSHA complaint.

Most recently, in Kalkunte v. DVI Financial Services, Inc., ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), discussed *supra*, the ARB stated in dicta that the CEO of a publicly traded company who dismissed a complainant for allegedly retaliatory reasons could have been held personally liable under SOX 806. Looking to 18 U.S.C.A. § 1514A(a) and the implementing regulations at 29 C.F.R. 1801.101 and 1801.102, the ARB noted that the CEO of DVI, the publicly traded company, was an "officer" within the meaning of those provisions and therefore could be personally liable under SOX 806. The ARB did not decide the issue, however, because the ALJ had not allowed the complainant to amend his complaint to add the CEO in his individual capacity.

A few federal court decisions have concluded that SOX provides for individual liability, so long as the plaintiff has otherwise exhausted administrative remedies and set forth sufficient facts to state a claim for relief against the individuals. See, e.g., Bozeman v. Per-Se Technologies, Inc., 456 F. Supp. 2d 1282, 1357 (N.D. Ga. 2006) ("While the regulations implementing SOX may provide for individual liability, that does not obviate the need for the Plaintiff to exhaust his administrative remedies for each claim he seeks to assert against each defendant."); Bury v. Force Prot., Inc., No. 2:09-1708-DCN-BM, 2011 WL 2935916 (D.S.C. June 27, 2011) report and recommendation adopted, CA 2:09-1708 DCN BM, 2011 WL 2929827 (D.S.C. July 19, 2011) (stating that, "individual liability is permitted under SOX," but dismissing individual defendants because plaintiff failed to state a plausible claim for relief); Bridges v. McDonalds Corp., 09-CV-1880, 2009 WL 5126962 (N.D. Ill. Dec. 21, 2009) (the regulations implementing SOX may provide for individual liability but plaintiff must exhaust her administrative remedies for each claim that she seeks to assert against each defendant).

C. Covered Employees

29 C.F.R. § 1980.101 defines "employee" as "an individual presently or formerly working for a company or . . . an individual applying to work for a company or . . . whose employment could be affected by the company . . . ." In many cases, a person's status as an employee is obvious. In other instances where an employee works for a non-publicly traded subsidiary or agent of the publicly traded parent, courts and the DOL have engaged in the analyses described above. The scope of the definition has also been addressed in several other contexts:

1. Independent Contractors

In Bothwell v. American Income Life, 2005-SOX-57 (ALJ Sept. 19, 2005), respondent argued that complainant was not protected under Section 806 because he was an independent contractor, not an employee. In evaluating whether the complainant was an independent contractor, the ALJ adopted the common law agency test, which, as set forth in Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992), focuses on the hiring party's right to control the manner and means by which the product is accomplished. The ALJ refused to grant summary decision for the respondent on this issue because complainant presented evidence demonstrating that respondent retained control over the means by which his work was performed. For instance, there was evidence that complainant was required to report to his superiors every day at a specific time, was given a specific list of daily contacts and appointments, was not allowed to alter his sales presentation or decide how to accomplish any tasks without first receiving input, had no control over his work hours or appointment schedule, and was required to complete all of his work at respondent's office. In Deremer v. Gulfmark Offshore, Inc., 2006-SOX-2 (ALJ June 29, 2007), the ALJ found that the complainant was an independent contractor under agency law but was also covered employee for SOX purposes because complainant's employment could be affected by respondent company. Thus, whether an independent contractor meets the statutory requirements of a "covered employee" is largely dependent on the factual circumstance regarding the individual's level of control over his or her employment.

2. Officers and Directors

In Vodicka v. DOBI Medical Int'l, Inc., 2005-SOX-111 (ALJ Dec. 23, 2005), respondent moved for summary decision on the grounds that complainant was a member of its board of directors and therefore was not an employee protected under Section 806. The ALJ noted that, although corporate officers have been held to be employees under SOX, whether directors are "employees" under SOX was an issue of first impression. While an "interesting and difficult issue," the ALJ resolved the case on other grounds.

3. Third Parties

In Davis v. United Airlines, Inc., 2001-AIR-5 (ALJ Apr. 23, 2002), an ALJ denied derivative protection to spouses of whistleblowers based solely upon their status as spouses.

D. Protected Activity

Over the course of the last decade, the ARB and some courts had radically restricted the concept of protected activity as described in the language of the Sarbanes-Oxley Act. Most decisions prior to 2010, for example, afforded Section 806 protections only to employees who expressly complained about fraud against shareholders, while fewer recognized that the plain language of the statute covered complaints about violations of any of the laws or regulations enumerated in that section. In a series of decisions beginning with Sylvester v. Parexel Int'l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 23, 2011), the ARB began what has become a steady trend in the direction of strengthening protections for whistleblowers under Sarbanes-Oxley, by expanding the definition of protected activity under the Act.

1. "Definitively and Specifically" Relates

A steady string of cases originating with the ARB and followed by several circuit court decisions required the complainant to establish that the activity for which protection was claimed "definitively and specifically" related to one or more of the laws listed under 1514A(a)(1), even though the statute contained no such requirement. See, e.g., Van Asdale v. Int'l Game Tech., 577 F.3d 989 (9th Cir. 2009); Allen v. Administrative Review Board, 514 F.3d 468 (5th Cir. 2008); see also Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011) (dismissing plaintiff's SOX claim for lack of specificity because she did not identify "the allegedly illegal conduct," despite the evidence that the defendant knew that the illegal activities involved mail fraud, bank fraud, and other securities violations); (Welch v. Cardinal Bankshares Corporation, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB May 31,

2007) (employee who reported his employer's deviation from generally accepted accounting practices (GAAP) and other industry standards was not necessarily engaging in protected activity under SOX because such deviations are not inherently violations of securities laws) aff'd, Welch v. Chao, 536 F.3d 269 (4th Cir. 2008); Portes v. Wyeth Pharmaceuticals, Inc., No. 06-Civ-2689, 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007).

In 2011, starting with Sylvester v. Parexel Int'l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 23, 2011), the ARB has completed rejected the "definitively and specifically" relates element. Kathy Sylvester and Theresa Neuschafer were employees of Paraxel International LLC, a company that conducted clinical evaluations for pharmaceutical companies. In 2006, Sylvester and Neuschafer filed separate whistleblower complaints with OSHA, alleging that Parexel had discharged them in violation of SOX's anti-retaliation provisions. Between March and May of 2006, they complained to multiple supervisors that clinicians were violating the FDA's Good Clinical Practice standards by falsifying data during clinical trials of drugs for major clients. Parexel did not investigate their concerns or take any corrective action. In fact, after one of the employees Neuschafer accused of falsifying data physically and verbally attacked her, Parexel issued Neuschafter and Sylvestor letters of warning for provoking the attack and did not discipline the attacker. Following their complaints, both women were also subjected to retaliation from co-workers, including expressions of hostility and vandalism of their belongings. Ultimately, Parexel terminated Sylvester and Neuschafer on the grounds that they were not "team players."

After OSHA dismissed their complaints, Neuschafer and Sylvester appealed to an Administrative Law Judge, who also dismissed their claims. The ALJ held that the charges they filed with OSHA failed to allege protected activity within the meaning of SOX because their complaints to Parexel management: (1) did not relate "definitively and specifically" to a violation of any of the laws enumerated in SOX 806; (2) did not involve an actual violation by Parexel of any of the laws enumerated in SOX 806; (3) did not involve shareholder fraud, fraud generally, or conduct otherwise adverse to shareholders; and (4) did not constitute reasonable concerns about SOX violations. Sylvester, ARB No. 07-123, at 7. The ALJ dismissed the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Id. at 11.

In reversing the ALJ's ruling, the ARB held that requiring a SOX whistleblower to show that her complaints "definitively and specifically relate[d]" to one of Section 806's enumerated laws or regulations ignored the plain language of the Act, which protects good-faith, reasonable reports of fraud and securities violations. Id. at 17–19. The ARB noted that its earlier decision in Platone v. FLYi, Inc. ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006), had borrowed this restrictive concept from case law interpreting a specific provision of the Energy Reorganization Act that had no parallel in the SOX anti-retaliation provisions. Beyond being inappropriate for this reason, the ARB found, the importation of the "definitive and specific" standard conflicted with Section 1514A's express prohibition of discriminating against any employee for providing information about conduct the employee "reasonably believes" to be a

SOX violation. Sylvester, ARB No. 07-123, at 18–19; see also Inman v. Fannie Mae, ARB No. 08-060, ALJ No. 2007-SOX-047, at 7 (ARB June 28, 2011) (a complainant's reports do not have to "definitively and specifically" relate to an one of 18 U.S.C. 1514A's enumerated categories because such a requirement would conflict with the reasonable belief requirement).

The Sylvester ARB noted that a "definitively and specifically" test had "been followed in a number of ARB decisions, and deferred to on appeal in several circuit court decisions with neither reflection nor further analysis of the term's origin or correct application," and that it had "evolved into an inappropriate test . . . often applied too strictly." Id. at 18 (footnote omitted). It also noted, however, that a number of other circuit court decisions had made no such reference to that language or test. Rather than delve further into these divergent interpretations, the ARB reemphasized the language of the legislation itself—which requires only that the employee report conduct she reasonably believes to be a violation of federal law—and held that "[i]t was therefore error for the ALJ to dismiss the complaints in this case for failure to meet a heightened evidentiary standard espoused in case law but absent from the SOX itself." Id. at 19.

It is unclear what level of deference federal courts will afford Sylvester and other recent ARB decisions. In Wiest v. Lynch, No. 10-3288 (E.D. Pa. Nov. 15, 2011), the Federal District Court for the Eastern District of Pennsylvania rejected a motion for reconsideration of its decision dismissing the case of an alleged whistleblower at Tyco Electronics Corp. Jeffrey Wiest alleged that he was placed on leave and then terminated from his position in Tyco's accounts payable department as a result of his questioning Tyco's event expenditures, which in his mind were overly extravagant in the wake of a corporate fraud scandal involving Tyco's former CEO.

In dismissing the complaint, Judge Gene Pratter wrote that "[the Sarbanes-Oxley Act ("SOX")] protects an employee who has 'provided information' to a supervisor regarding conduct that the employee 'reasonably believes' violates one of the specific provisions enumerated in § 1514A. For a communication to be protected, it must 'definitively and specifically' relate to one of the statutes or rules listed in § 1514A," citing Platone v. FLYi, Inc. and its progeny. Judge Pratter found that evidence provided by the Plaintiff did not meet this standard, and, therefore, granted the dismissal based on the Plaintiff's failure to demonstrate that he had engaged in a protected activity. Id. at 3.

The Plaintiff's motion for reconsideration brought to the Court's attention the case of Sylvester v. Parexel Int'l LLC, and argued that the evidence he presented would meet this standard. Id. at 4. Judge Pratter disagreed. In response to the Plaintiff's argument that Sylvester constituted an intervening change in the controlling law, the Court stated that "the ARB's decision [in Sylvester] is neither intervening nor controlling. . . . [I]t is not an intervening change in the law because the ARB issued its opinion well before this Court ruled on the Defendants' Motion to Dismiss." The Court continued, "Equally fatal is that the ARB's decision in Sylvester does not constitute a change in controlling law. . . . An ARB decision is not binding authority on a United States district court." Id. at 5-7. This is a fairly controversial stance, given the 1984

Supreme Court decision of Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, which has been interpreted to grant deference to agencies' precedent. The Court's opinion gives a cursory mention of Chevron in a footnote, id. at 7 n.7, and goes on to explain that "even assuming, *arguendo*, that Sylvester does constitute binding precedent," the dismissal will not be overturned because the Court's holding relied on cases other than Platone and Wiest did not meet the Sylvester standard anyway. Id. at 7-9.

While this decision is concerning, the court's statements about the deference owed to ARB decisions are largely dicta because the court found that Wiest did not meet the Sylvester standard anyway. In a very recent First Circuit case, the court did not defer to the Department of Labor's or Securities and Exchange Commission's interpretation of a term, but indicated that on-point holdings of the ARB would be due some deference. Lawson v. FMR, LLC, ---F.3d ----, 2012 WL 335647, at *18 (1st Cir. 2012).

The ARB has been consistent with its Sylvester holding following the Wiest decision. In Prioleau v. Sikorsky Aircraft Corp., ARB No. 10-060, ALJ No. 2010-SOX-003, (ARB Nov. 9, 2011), the ARB reversed the ALJ's grant of summary judgment to the defendant on the basis that Prioleau's report failed to "definitively and specifically" articulate a SOX violation and was therefore not protected. The ARB stated, "In Sylvester, we made clear that the "definitive and specific" standard that the ARB had employed in prior ARB cases and the ALJ noted in this case was inconsistent with Section 806's statutory language." Id. at 7 n.3 (internal citations omitted). The ARB held that Prioleau had put forth sufficient evidence to generate a genuine issue of material fact as to whether to he communicated a reasonable belief of a violation. Id. at 8-9.

2. Nature of the Reports

Recent cases out of the ARB and some federal courts have expanded the persons to whom and about whom a whistleblower can report and expect protection. This year, federal courts and the ARB held that the reporting of third-party conduct, if reasonably believed to constitute a violation of a law listed in SOX 806, is protected activity. Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472 (E.D.N.C. Mar. 10, 2011); Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011); Funke v. Federal Express Corp., ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011). The ARB also expanded the scope of persons to whom a whistleblower can report and receive protection. See, e.g., Vannoy v. Celanese Corp., ARB No. 09-118, ALJ No. 2008-SOX-064 (disclosures to the IRS protected); Funke, ARB No. 09-004, at 15-16 (reports to persons other than supervisors who have the authority to investigate, discover, or terminate misconduct and reports to local law enforcement both protected).

Sharkey v. J.P Morgan Chase, which preceded Sylvester v. Parexel, held that the plaintiff did not sufficiently state "specific violations" when she informed her superior that she "believed their client was engaged in illegal activities." J.P. Morgan's compliance and risk management team contacted Sharkey to express concern that one of her employer's clients might be involved in illegal activities, including mail fraud, bank fraud, and money laundering. In response to this allegation, Sharkey conducted independent research into the client's activities and determined that the client was violating federal securities laws. Sharkey communicated this to her superior. Despite evidence that the J.P. Morgan knew that the illegal activities likely involved mail fraud, bank fraud and securities violations, the court dismissed the plaintiff's SOX claim for lack of specificity on the grounds that Sharkey had not sufficiently identifed "the allegedly illegal conduct."

Although the court dismissed on these grounds, the Sharkey decision is more significant for its finding that the plaintiff engaged in protected activity when she complained not about the conduct of her employer, J.P. Morgan, but about that of a client of the employer. Id. at *6; see also Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472 (E.D.N.C. Mar. 10, 2011) (citing and following Sharkey's holding that SOX does not require that the complainant reports fraudulent conduct of his employer in order to be entitled to protection). "In light of the language of the statute and the legislative history," the court wrote, "Plaintiff has properly pled that she engaged in conduct protected by 18 U.S.C. § 1514A when she repeatedly reported her concerns regarding the Client's illegal activity to the Individual Defendants and JPMC's risk and compliance team." Id. To the extent that courts adopt the view that SOX prohibits a covered employer from retaliating against an employee for her reports of unlawful conduct by someone other than the employer, this case will have initiated a significant broadening in the coverage of the statute. The ARB cited this decision for support when it issued Funke v. FedEx, holding that reports of third-party conduct qualifies as protected activity.

At issue in Funke v. FedEx was whether the complainant, a FedEx courier, had engaged in protected activity under SOX when she alerted local law enforcement authorities that a FedEx customer was using FedEx as a conduit for what she suspected was mail fraud. The complainant, Heidi Funke, alleged that FedEx had violated the whistleblower-protection provisions of SOX by suspending her in retaliation for her disclosures to local law enforcement. Prior to her whistleblowing activity, Funke, who had worked at FedEx for over 15 years, had maintained an exemplary employment record.

In her complaint, Funke alleged that she made a series of reports to her dispatcher about suspicious packages in accordance with her training. When the dispatcher refused to relay her concerns to the fraud or security department of FedEx, she went to the local sheriff's office and informed them of her suspicions. FedEx chastised Ms. Funke for reporting to law enforcement and placed her on suspension. Her supervisor said that "FedEx's policy, written or not, prohibited her from notifying law enforcement regarding suspected illegalities encountered in the course of her duties." Id. at 5. Subsequently, FedEx officials told Funke that informing law enforcement about FedEx's operations "opened FedEx up to civil and criminal liability" and that the issue was being addressed at the "highest levels of security, human resources, and legal," which all "wanted to fire her for going to law enforcement." Id.

Both OSHA and the ALJ dismissed Funke's complaint, reasoning that reports of mail fraud allegedly perpetrated by a third party were not protected under SOX, and that Ms. Funke had therefore failed to prove she was engaged in protected activity. Referring back to the plain language of the statute, which contains no requirement that the reported conduct be committed by the complainant's employer, the ARB concluded that the reporting of third-party conduct, if reasonably believed to constitute a violation of a law listed in SOX 806, is protected activity. The ARB noted that two recent federal district court cases, Feldman, 2011 WL 891447, at *12 and Sharkey v. J.P. Morgan Chase & Co., 2011 WL 135026, at *5-6 had reached the same conclusion. Id. at 8.

The Funke decision not only expanded the range of entities about whose fraudulent conduct a whistleblower could make a protected disclosure, but it also expanded the scope of parties to whom a whistleblower could report her concerns and receive protection under SOX 806. FedEx argued that Funke's reports to the company's dispatchers were not protected by SOX because the dispatchers had no supervisory authority over her, and that her reports to the Sheriff's Department were likewise unprotected because they were not to "federal law enforcement" as required by the statute.

The ARB rejected the former defense, finding that SOX protects employees who report misconduct not only to supervisors but also to "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." Id. at 15; 18 U.S.C.A. § 1514A (a)(1)(c). The ARB rejected the latter defense on grounds that Section 1514A was unclear as to whether it covered only reports to federal authorities. Despite its language, the ARB reasoned, it was the clear intent of the statute to protect all such reports and not to exclude reports to local officials. Id. at 16. The ARB also reasoned that Funke's awareness of a prior investigation of a similar matter by local officials in which federal officials became involved made it reasonable for her to believe local officials would bring federal law enforcement authorities into the current investigation. Funke, ARB No. 09-004, at 15.

However, in Tides v. Boeing, 644 F.3d 809 (9th Cir. 2011), cert. denied, 132 S. Ct. 518 (2011), the Ninth Circuit restricted to whom a whistleblower can report and be protected under the Sarbanes-Oxley Act, interpreting protected activity to exclude leaks to the media. The United States Supreme Court declined to review the case.

The case involved two members of Boeing's Sarbanes-Oxley Audit group, Matthew Neumann and Nicholas Tides. In 2007, Neumann and Tides claimed to have found several deficiencies in Boeing's auditing practices. Neumann and Tides raised their concerns with the appropriate authorities in Boeing management, who were unresponsive. Turned away by management, Neumann and Tides disclosed their concerns to a reporter from the Seattle Post-Intelligencer who used the material to publish an exposé that summer. An internal investigation by Boeing found that Neumann and Tides had leaked the information, and they were terminated.

Neumann and Tides sued Boeing for terminating them in violation of SOX's anti-retaliation provisions. The district court granted summary judgment to Boeing. On appeal, plaintiffs argued that going to the media is a way of communicating a message to Congress and is not prohibited because the statute contains no confidentiality requirement. The three-judge panel upheld the lower court's decision, finding this argument to lead to a "boundless interpretation of the statute," rendering almost all communication conceivably applicable. Id. at 815. The court therefore held that Section 1514A(a)(1) "does not protect employees of publicly held companies from retaliation when they disclose information regarding designated types of fraud or securities violations to members of the media." Id. at 816-17.

Finally, in another expansion of protected-SOX activity, the ARB in Inman v. Fannie Mae, ARB No. 08-060, ALJ No. 2007-SOX- 047 (ARB June 28, 2011), held that an employee's reports of misconduct already known to the employer are protected from retaliation under SOX. "[N]either the SOX nor its implementing regulations," the ARB reasoned, "indicate that an employee does not engage in protected activity when he informs his employer about violations of which the employer is already aware."). Id. at7.

3. Reasonable Belief Requirement

In order to gain protection under the whistleblower protection provisions of Sarbanes-Oxley, an employee must act upon a "reasonable belief" that the complained of conduct violates Section 1514A. The reasonableness of an employee's complaint has both subjective and objective components. See Gale v. United States Dep't of Labor, 384 Fed. App'x 926, 929 (11th Cir. 2010); Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009); Harp v. Charter Commc'ns, 558 F.3d 722, 723 (7th Cir. 2009). The objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Harp, 558 F.3d at 723. The issue of "objective reasonableness" often involves factual issues that cannot be determined as a matter of law. Allen, 514 F.3d at 477-78.

To satisfy the subjective component, the employee must actually have believed that the conduct he complained of constituted a violation of relevant law. The subjective reasonable belief analysis often includes consideration of objective factors, blurring the line between the two components. In Day v. Staples, the court stated that "[a]s to the subjective component [of the SOX 806 reasonable belief test], the law is not meant to protect those whose complaints are not undertaken in subjective good faith." Id. In holding that Day had a subjective good faith belief, the First Circuit agreed with the lower court that it should look to objective factors, stating that a "plaintiff's particular educational background and sophistication [is] relevant to the subjective component." Id. at 54, n.10. The court further noted that "[s]ubjective reasonableness requires that the employee actually believed the conduct complained of constituted a violation of pertinent law."

Because courts and the ARB had often required that an employee's complaints related "definitively and specifically" to fraud on shareholders or violations of the federal fraud or SEC provisions described in 18 U.S.C. § 1514A(1)(1), a number of decisions prior to 2010 applied the "reasonable belief" standard in an unduly restrictive fashion. Courts set an extremely high bar for plaintiffs to show that their belief that fraud occurred was objectively reasonable. See, e.g., Day, 555 F.3d at 54; Harkness v. C-Bass Diamond, LLC, No. CCB-08-231, 2010 WL 997101, at *7 (D. Md. Mar. 16, 2010) ("In light of Ms. Harkness's professional experience and the legal resources available to her, Ms. Harkness's belief that [her employers] was in violation of [an SEC rule] was not objectively reasonable.") Id. at 7. These decisions required a level of expertise from the whistleblower not required by the language of SOX.

As an example of this strict approach, the Day court specifically addressed the objective reasonableness analysis, laying out a three-prong analysis and principles that may have broader application, including a materiality requirement. First, the court held that the complaint must relate to one of three categories of conduct proscribed by 18 U.S.C. 1514A(a)(1), namely: (a) a violation of enumerated federal criminal fraud statutes; (b) a violation of any rule or regulation of the SEC; and/or (c) a violation of any provision of federal law relating to fraud against shareholders. Second, the court held that the employee's communication must relate specifically to one of the three categories of prohibited conduct, though the employee need not identify a precise code provision or an actual violation of such provision. Third, the court held that the employee's communication must at least approximate a claim of securities fraud. In applying this tripartite test to the facts before it, the court made several findings that may have wider implications: (1) mere disagreement about corporate efficiency is not actionable; (2) mere allegation of needless loss of revenue is not actionable; (3) mere allegation of billing discrepancy is not actionable; and (4) mere allegation of general accounting provisions is not actionable. The court reasoned that the materiality of the alleged violation is important to an assessment of the objective reasonableness of a complaint of shareholder fraud. Thus, if the complaint is merely of internal practices that are not financial in nature and are not reported to shareholders, the complainant cannot be said to have a reasonable objective belief that shareholder fraud has occurred.

Likewise, in Harp v. Charter Communications, Inc., 558 F.3d 722 (7th Cir. 2009), the Seventh Circuit also set guidelines for objective reasonableness, though not as systematically as the Day court. The court stated that "[o]bjective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Id. at 723; see also Drake v. Agency for Int'l Dev., 543 F.3d 1377 (Fed. Cir. 2008) (holding that the test for reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the complainant could reasonably conclude that a violation occurred). In Harp, the court identified several objective indicators that led to its conclusion that plaintiff did not have a reasonable belief in an actual or potential violation of one of the enumerated provisions. First, the court noted that the employee's alleged protected activity consisted of a conversation in which the employee was attempting to determine whether his supervisor intended to pay certain invoices. Nowhere in that conversation did the employee complain that the employer was engaging in activity that would constitute fraud or an SEC violation; rather, the court found that he made only ambiguous statements and inquiries, suggesting that she did not objectively believe that fraud was occurring. Next, the court noted that the supervisor to whom the employee initially complained continually supported her efforts to investigate improper billing even after her ethics complaint to her human resources department. One dissenting judge, however, held that this latter point did not indicate a lack of objective belief and that it was possible to reconcile the supervisor's supposed support for the employee with her objective belief that fraud was occurring.

However, this strict interpretation of the reasonable belief standard will likely be softened by the many recent ARB decisions expanding protected activity and clarifying what is required for entitlement to protection. For example, the Sylvester v. Parexel decision, discussed above, stated, "To sustain a complaint of having engaged in SOX-protected activity, where the complainant's asserted protected conduct involves providing information to one's employer, the complainant need only show that he or she 'reasonably believes' that the conduct complained of constitutes a violation of the laws listed at Section 1514," id. at 14, and rejected elements applied in past decisions like the "definitive and specific" relationship standard, the requirement that the complaint relate to shareholder fraud, and a requirement of materiality. See also Prioleau v. Sikorsky Aircraft Corp., ARB No. 10-060, ALJ No. 2010-SOX-003 (ARB Nov. 9, 2011) (following Sylvester's holding and correcting ALJ's assertions that plaintiff's complaints had to definitely and specifically relate to fraud on shareholders). In holding that a plaintiff did not have a reasonable belief of a violation, many of the previous decisions actually imported one more of these elements rejected by Sylvester into the reasonable belief analysis.

The ARB emphasized in Sylvester that a SOX whistleblower does not need to show that an actual violation of one of the laws or regulations enumerated in Section 806 has already occurred, and instead is protected as long as she had a subjectively and objectively "reasonable belief" that the conduct she complained about amounted to a violation that was *likely to occur*. Id. at 14–16 (emphasis added). In other words, a complainant does not need to wait until a violation has been committed as long as the employee reasonably believes, based on facts know to her, that the violation is likely to happen. Id. at 16; see also Funke, ARB No. 09-004, at 11 ("[D]isclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen. Such a belief must be grounded in facts known to an employee, but an employee need not wait until a law has actually been broken to register a concern."). Id. at 11. Previously the Fourth Circuit held that a plaintiff's reasonable belief must be about "an *existing* violation" and that the plaintiff in Livingston had articulated only a *prospective* or pending violation. Livingston v. Wyeth, Inc., 520 F.3d 344, 352 (4th Cir. 2008). However, Sylvester pointed out that in a different case, Welch v. Chao, that the Fourth Circuit held that SOX did not require an employee to complain of an actual violation and that such a requirement would conflict with the "reasonable belief" requirement." Sylvester, ARB No. 07-123, at 16 (citing Welch v. Chao, 536 F.23d 269, 277), and that the Fifth Circuit held the same. Id. (citing Allen, 514 F.3d at 476-77).

The ARB in Sylvester made two additional key points: (1) the employee does not need to explain the reasonableness of her belief internally or to proper outside authorities; and (2) "objective reasonableness" is a factual question generally not suitable for dismissal as a matter of law, in part because it "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Id. at 15 (quoting Harp v. Charter Communications, 558 F.3d 722, 723 (7th Cir. 2009).

While an employee who acts on a reasonable belief is protected even if that belief later turns out to be wrong, where the complainant's belief is unreasonable from the outset, the complainant's activity will not be protected. See Heaney v. Prudential Real Estate Affiliates, Inc., No. 05-820, 2008 WL 2704542 (E.D. La. July 3, 2008) (holding that mere allegations of misrepresentations by employer without sufficient showing that plaintiff reasonably believed there had been a violation of § 1514A did not state a cause of action under SOX); Skidmore v. ACI Worldwide, Inc., No. 8:08CV01, 2008 WL 4186247 (D. Neb. June 18, 2008) (finding that an accounting dispute that the employee did not reasonably believe implicated fraud was not protected activity under SOX).

4. **Fraud**

As discussed above, to constitute protected activity, the subject matter of a SOX complaint must implicate a purported violation of "section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C.A. § 1514A(a). SOX's legislative history reflects that fraud is an integral element of a cause of action under the whistleblower provision. See, e.g., Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy) (whistleblower provision to protect "those who report fraudulent activity that can damage innocent investors in publicly-traded companies"); S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (the relevant section "would provide whistleblower protection to employees of publicly-traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company").

Federal courts had been split regarding whether SOX 806 protections applied only to employees who complained about fraud against shareholders or whether employees who complained about any of the six enumerated types of violations were protected. Compare Bishop v. PCS Admin., (USA), Inc., No. 05 C 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006) (finding that the phrase "relating to fraud against shareholders" must be read as modifying all violations enumerated under Section 806) with O'Mahony v. Accenture Ltd., 537 F.Supp.2d 506, 517 (S.D.N.Y. 2008) (finding Section 1514A protections based upon the whistleblower's reporting of fraud "under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud."). Most decisions prior to 2010 afforded Section 806 protections only to employees who complained about fraud against shareholders, while fewer recognized that the plain language of the statute covered complaints about violations of any of the laws or regulations enumerated in that section.

One example of the narrow interpretation of the fraud requirement is found in Skidmore v. ACI Worldwide, Inc., No. 08:08CV1, 2008 WL 2497442 (D. Neb. June 18, 2008). There, the court held that "[i]n order for a SOX claim to survive a Rule 12(b)(6) motion to dismiss, a complaint must state a cause of action where an employee reasonably believed that the reported conduct was violating the provisions of §§ 1514A relating to shareholder fraud." Id. at *4. The court found that the Plaintiff had not alleged any facts supporting his contention that booking an estimated tax rate, not backed by supporting information, related to fraud against shareholders. Id. In reaching its conclusion that a SOX 806 claim requires an allegation relating to shareholder fraud, the court looked to recent decisions. See, e.g., Livingston v. Wyeth, Inc., 520 F.3d 344, 353 (4th Cir. 2008) (holding that employee disclosures must be related to illegal activity and involve shareholder fraud); Smith v. Corning Inc., 496 F. Supp. 2d 244 (W.D.N.Y. 2007) (denying Rule 12(b)(6) motion because plaintiff reasonably believed defendant's actions were in violation of the provisions of SOX 806 and the violation was related to shareholder fraud).

Other courts, looking to the language and legislative intent behind SOX 806, have concluded that the alleged violation may related to any of the six categories enumerated in 18 U.S.C. § 1514A. For example, in Reyna v. Conagra Foods, Inc., 506 F.Supp.2d 1363, 1383 (M.D. Ga. 2007), the court noted that the punctuation of SOX 806 clearly indicated that the drafters intended for the last clause relating to fraud against shareholders to stand alone and not to modify the other clauses relating to fraud, and that there were no other indicia in the statute to suggest a contrary intent. Therefore, the court denied summary judgment against the employee-plaintiff, concluding that protected activity may consist solely of the reporting of mail or wire fraud. Similarly, in Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008), the court affirmed the ARB's legal conclusion that an employee's complaint must "definitively and specifically relate to one of the six enumerated categories found in § 1514A [SOX 806]." The court noted that its decision was consistent with holdings of the Administrative Review Board in cases such as Platone v. FLYI, Inc., ARB Case No. 04-154, 2006 WL 3246910, at *8 (ARB Sept. 29, 2006) and Harvey v. Home Depot USA, Inc., ARB Case No. 04-114, 2006 WL 3246905, at *11 (ARB June 2, 2006).

Recently the ARB explicitly agreed with the line of cases holding that a SOX whistleblower need not complain about fraud on shareholders and corrected what had become an increasingly common misapplication of SOX – requiring whistleblowers to allege all the elements of a securities fraud claim. Sylvester, ARB No. 07-123, at 19–22; see also Funke, ARB No. 09-004, at 11 (following Sylvester's holding that disclosures do not need to relate to fraud against shareholders in order to be considered protected under SOX). Looking to the language of

Section 806, the ARB explained that the first five enumerated categories of illegality would be rendered meaningless if each also required a specific complaint of fraud on shareholders. Sylvester, ARB No. 07-123, at 20. Further, the language of SOX 806 indicates that mail fraud, wire fraud, securities fraud, and bank fraud, or a violation of an SEC or securities regulation, while not immediately affecting investors, may be a critical step in what would ultimately result in shareholder fraud. Id. at 21. Similarly, the ARB explained that requiring an employee to allege or prove all the elements of fraud would be in conflict the statute's reasonable belief requirement and undermine the fundamental purpose of Section 806, which is to protect and encourage disclosures not only of existing fraud, but also potential fraud in its earliest stages. Id. at 21.

5. Enumerated Federal Provisions

Regardless of the interpretation of the enumerated categories, it is important to note that Section 806 protects against retaliation for reports implicating the enumerated *federal* fraud statutes, SEC rules, or federal law "relating to fraud against shareholders." Thus, in Allen v. Stewart Enterprises, Inc., 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005), the ALJ found that the complainant had not engaged in protected activity where the complainant raised concerns about possible violations of state laws which could result in sanctions and revocation of respondent's state licenses. The ALJ found that such complaints, though based on a reasonable belief, did not implicate SOX 806 because they did not relate to federal law.

6. Intent to Deceive or Defraud

Some courts have held that because an essential element of fraud is an intent to defraud or deceive, a Section 806 complaint must allege a degree of intentional deceit or fraud. The Fifth Circuit Court of Appeals addressed this issue in depth. See Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008). The Allen court held that the sixth enumerated category of SOX 806 relating to fraud on shareholders was a "catch-all" category, unlike the previous five categories which point to specific statutes and regulations, and that therefore the employee must have reasonably believed that his or her employer "acted with a mental state embracing intent to deceive, manipulate, or defraud its shareholders." Id. at 480. Accordingly, the court stated that "[m]ere negligence on the part of the employer does not constitute a violation of federal law relating to fraud against shareholders." Id. In a footnote, the Allen court stated that it was not expressing an opinion on whether the other five enumerated categories of protected activity also required scienter. The court identified a split in authority, noting that several ALJs had held that fraud is an essential element of all whistleblower claims arising under § 1514A, which necessarily includes an element of intentional deceit. See Gale v. World Fin. Group, 2006-SOX-43, 2006 WL 3246898, at *4 (ALJ June 9, 2006) (Romero, J.); Wengender v. Robert Half Int'l, Inc., 2005-SOX-59, 2006 WL 3246887, at *11 (ALJ Mar. 30, 2006) (Kennington, J.); Marshall v. Northrup Gruman Synoptics, 2005-SOX-8, 2005 WL 4889013, at *3 (ALJ June 22, 2005) (Price, J.); Hopkins v. ATK Tactical Sys., 2004-SOX-19, slip op. at 6 (ALJ May 27, 2004)

(Wood, J.). It remains an open question as to whether intent is required for these first five categories.

7. Materiality

As noted above, under Section 806, employees need only demonstrate, by a preponderance of the evidence, that they had a "reasonable belief" that they were reporting a violation of securities fraud statutes or SEC rules. In cases of deliberate or knowing misstatements in financial records, the SEC has recognized that "reasonable belief" does not require that the misstatements be material. This is evident in the requirements of § 13(b) of the Securities Exchange Act of 1934 as explained by the SEC's Staff Accounting Bulletin No. 99:

> Even if misstatements are immaterial, registrants must comply with Sections 13(b)(2) - (7) of the Securities Exchange Act of 1934 (the "Exchange Act"). Under these provisions, *each registrant* with securities registered pursuant to Section 12 of the Exchange Act, or required to file reports pursuant to Section 15(d), *must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant and must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP*. In this context, determinations of what constitutes "reasonable assurance" and "reasonable detail" are based not on a "materiality" analysis but on the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs. *Accordingly, failure to record accurately immaterial items, in some instances, may result in violations of the securities laws*.

(Emphasis Added).[5] Courts have acknowledged that by its terms SOX 806 does not require a showing of materiality. In Welch v. Chao, 536 F.3d 269 (4th Cir. 2008), the Fourth Circuit Court of Appeals held that while many of the laws listed in SOX 806 contain materiality requirements, nothing in the provision indicates that SOX 806 contains an independent materiality requirement. Thus, if the violation alleged by a complainant meets the materiality element of one of the enumerated fraud provisions, the complainant need not also show that the fraud itself had some material effect. The court noted that, for example, that a violation of § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 requires a statement or omission concerning a material fact, but a complainant need not make any other showing of materiality to establish an alleged

[5] "SEC Staff Accounting Bulletin: No. 99 – Materiality", DATE: August 12, 1999 U.S. Securities and Exchange Commission <http://www.sec.gov/interps/account/sab99.htm> (March 31, 2006) "2. Immaterial Misstatements That are Intentional," "Considerations of the Books and Records Provisions Under the Exchange Act."

violation of fraud on shareholders. Other Courts of Appeals have noted that with regard to such securities fraud, part of an analysis of a complainant's objective reasonableness is whether the alleged statements or omissions would likely have been viewed by the reasonable investor as having "significantly altered the total mix of information made available." Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009); Livingston v. Wyeth, Inc., 520 F.3d 344, 355 (4th Cir. 2008).

E. **Prohibited Retaliation**

SOX 806 prohibits publicly traded companies and their officers, employees and agents, from discharging, demoting, suspending, threatening, harassing, "or in any other matter discriminat[ing] against an employee because of any lawful act done by the employee" relating to such alleged violations. 18 U.S.C.A. § 1514A(c). See generally "Sarbanes-Oxley Act of 2002," H. Rept. No. 107-610 (July 24, 2002). Previously, courts and the DOL held that the standard for determining what constitutes an adverse action for purposes of SOX 806 was whether the employee suffered a tangible consequence or ultimate employment action. This analysis changed following the Supreme Court's decision in Burlington Northern & Santa Fe Railway. Co. v. White, 548 U.S. 53 (2006). Under Burlington Northern, the relevant question in determining whether an employer's actions are "adverse" is not whether the employee has suffered an ultimate employment action, such as termination or demotion, or whether the employer has formally disciplined the employee. Instead, the applicable standard for adverse employment actions is whether the employer's actions were "materially adverse." A materially adverse action is one that would have been harmful to the point that it could well dissuade a reasonable worker in the complainant's position, considering the totality of the circumstances, from engaging in protected activity.

Although Burlington Northern arose in the context of Title VII of the Civil Rights Act of 1964, courts and the DOL have adopted the Burlington Northern standard in analyzing adverse actions under SOX 806. See, e.g., Hardy v. City of Tupelo, NO. 1:08-CV-28-SA-JAD, 2009 WL 3678262 (N.D. Miss. Nov. 2, 2009); Allen v. Admin. Review Bd., 514 F.3d 468 (5th Cir. 2008); Miles v. Wal-Mart Stores, Inc., No. 5:06-CV-05162, 2008 WL 222694 (W. D. Ark. Jan. 25, 2008). Accordingly, adverse actions include a wide spectrum of specific conduct ranging from termination to increased scrutiny, and the objective material adversity of an employer's action is often a fact-specific determination. See, e.g., McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 2003-SOX-23 (ALJ Jan. 16, 2004) (blacklisting); Gattegno v. Prospect Energy Corp., ARB No. 06-118, 2006-SOX-8 (ARB May 29, 2008) (constructive discharge); Fraser v. Fiduciary Trust Co., Int'l, No. 1:04-cv-06958, 2009 WL 2601389 (S.D.N.Y. Aug. 25, 2009) (demotion / reduced responsibilities); Reines v. Venture Bank and Venture Financial Group, 2005-SOX-112 (ALJ Mar. 13, 2007) (same); Levi v. Anheuser Busch Companies, Inc., ARB No. 08-086, 2008-SOX-28 (ARB Sept. 25, 2009) (failure to hire); Hughart v. Raymond James & Associates, Inc., 2004-SOX-9 (ALJ Dec. 17, 2004) (failure to promote); Grove v. EMC Corp., 2006-SOX-99 (ALJ July 2, 2007) (hostile work environment); Allen v. Stewart Enterprises, Inc., ARB No. 06-081, 2004-SOX-60 to 62 (ARB July 27, 2006) (increased scrutiny); Hendrix v. American Airlines, Inc., 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004) (reorganization / placement on a layoff list); McClendon v. Hewlett Packard, Inc., 2006-SOX-29 (ALJ Oct. 5, 2006) (transfer).

In a similar vein to the more expansive holdings regarding protected activity under SOX, a recent ARB decision gave a broad reading to what qualifies as an adverse action for purposes of SOX. Menendez v. Halliburton, Inc., ARB Nos. 09-002, -003, ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011). In Menendez, the ARB rejected the respondent's argument that an adverse action had to be a "tangible" or "ultimate" employment action, and instead held that an adverse employment action was appropriately defined as any unfavorable employment action that was more than trivial, including a purposeful breach of the complainant's confidentiality, as was at issue in the case.

Anthony Menendez filed a complaint alleging that his employer, Halliburton, Inc. had retaliated against him in violation of SOX's employee-protection provisions after he alerted the SEC and Halliburton's Audit Committee about potential violations of Generally Accepted Accounting Principles ("GAAP"). After OSHA dismissed the complaint, the ALJ determined that Menendez had engaged in SOX-protected activity, but dismissed his complaint on the basis that he had failed to prove that Halliburton had subjected him to retaliatory, adverse action. The ARB reversed, holding that Halliburton's breach of Menendez's confidentiality with regard to the complaint he filed with the audit committee qualified as an adverse action, and remanded for a determination of whether his protected activity was a contributing factor to that adverse action.

As the Director of Technical Accounting Research & Training, Menendez was responsible for monitoring and researching technical accounting issues, and advising and training field accountants. Mendendez raised concerns to a vice president and the controller for Halliburton's Energy Services Group about their revenue-recognition practices. In response to these concerns, in a taped meeting, the VP told Menendez that he was not a team player, not sensitive to Halliburton politics, and should collaborate more with colleagues on accounting issues. Subsequently, Halliburton studied the issues Menendez raised and disagreed with his concerns. The VP then refused to meet with Menendez to further to discuss his concerns for the remainder of the year. Menendez instead met with the VP of Financial Controls, who told him if he felt strongly he should contact the Audit Committee. After this, Menendez filed a confidential complaint with the SEC reporting that Halliburton, with the knowledge of its external auditor, was engaging in "questionable" accounting practices.

After learning that the SEC had contacted Halliburton in response to his confidential complaint, Menendez sent what he thought would be a confidential email to Halliburton's Audit Committee raising the same concerns he had raised to the SEC. Despite Halliburton's stated policy assuring confidentiality of such complaints, the company's general counsel, in an email instructing that documents be preserved, identified Menendez as the party responsible for the

SEC investigation to a number of company management officials, including those implicated by Menendez's allegations. One of those implicated forwarded the email to fifteen members of the Finance & Accounting team, including Menendez.

Upon receiving the email, Menendez immediately left the office and stayed out the rest of the week on prescheduled leave. When he returned, his co-workers and the auditors he generally worked closely with refused to interact with him. Menendez, at the request of his legal counsel, was granted six months paid administrative leave because of the "current environment and circumstances involving the SEC investigation." Id. at 7 (footnote omitted). Shortly after this, the company shifted the courses Menendez was supposed to teach at a company Accounting Summit to someone else. When Menendez's leave of absence was about to expire, the SEC formally notified him that no enforcement action was being recommended. Halliburton contacted Menendez and told he must return to the same position but that he would now report to the Director of External Reporting for the Finance & Accounting group. Menendez resigned his employment because he thought the new reporting requirement constituted a demotion and that he believed Halliburton intended to continue violating securities laws and filing misleading financial information.

The ARB reversed the ALJ's holding that Menedez did not prove he had suffered any adverse action as a result of his protected activity. The ARB first held that while Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), which establishes the standard for adverse action in Title VII cases, is a helpful interpretive tool in whistleblower cases, the plain language of Section 806's adverse action provision controls. Menendez, ARB Nos. 09-002, -003, slip op. at 15. Contrasting the language of Section 806 with that of Title VII provisions, the ARB explained that Section 806 "language explicitly proscribes non-tangible activity, which evinces a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. This difference in statutory construction convinces us that adverse action under SOX Section 806 must be more expansively construed than that under Title VII." Id. at 17.

Noting the similarity between the anti-retaliation language in SOX and the AIR 21 law protecting whistleblowers in the aviation industry, the ARB adopted for SOX cases the standard of actionable adverse action it had established for AIR 21 cases in Williams v. American Airlines, Inc., ARB No. 09-018, slip op. at 12–15(ARB Dec. 29, 2010). Id. at 17. Pursuant to this standard, adverse actions are "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." Id. (quoting Williams, ARB No. 09-018, slip op. at 10–11 n.51) (quotations omitted). The ARB rejected the respondent's argument that because Section 806 parallels Title VII's anti-discrimination provision language, including the "terms and conditions" of employment clause, more closely than its anti-retaliation provision language, adverse action under Section 806 should be interpreted to require an "ultimate employment decision." Instead the ARB considered the remedial purpose of SOX and found that, "[r]ather than a limitation on what is to be considered adverse action under Section 806, we are of the opinion that 'terms and conditions of employment' are not significant limiting words and should be construed broadly within the remedial context of Section 806." Id. at 18.

The ARB noted that before 2000, whistleblower law had consistently prohibited a wide range of employment actions, not limited to tangible consequences, monetary loss or ultimate employment decisions, but that, in the course of about a decade, these DOL precedents had been eroded by the adoption of adverse-action standard from Title VII cases. "This reliance on Title VII adverse action precedent," the ARB noted, "had the effect of narrowing the scope of actionable activity in direct contravention of earlier DOL precedent, which more faithfully reflected the congressional intent to provide broad protection for employees who engage in behavior Congress sought to encourage." Id. at 20 (footnote omitted). Because Burlington Northern had reinstated a broader definition of "adverse action" under Title VII as any action that would dissuade a reasonable employee from engaging in protected activity, the ARB noted that this case could be a useful starting place but that the ALJ had ignored the plain language of SOX and had also misapplied Burlington Northern. Id. at 20.

In his complaint, Menendez argued that the company's disclosure of his identity to various managers had breached his right to confidentiality, in violation of SOX Section 301, which requires that publicly-traded companies establish procedures for receipt of confidential complaints by employees regarding questionable accounting or auditing matters. 15 U.S.C. § 78j-1(m)(4). Because the purpose of the confidentiality provision is to encourage internal reporting, permitting employers to expose the identity of the reporter would "undermine SOX's overall purpose and objectives." Id. at 24. The right to confidentiality in Section 301 establishes a term and condition of employment within the meaning of Section 806's whistleblower protection provision, and a breach of confidentiality constitutes a violation of that term or condition and thus an adverse action. Id. at 24.

In a very important decision this year, the Seventh Circuit held that a whistleblower suit can be brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). DeGuelle v. Camilli, 664 F.3d 192 (7th Cir. 2011). Michael DeGuelle, a former tax employee of S.C. Johnson & Son, Inc. ("SCJ") from January 1997 until April 2009, alleged that he was terminated in response to reporting a tax fraud scheme to the company and federal law enforcement agencies. DeGuelle brought the case under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court dismissed DeGuelle's claims, finding that the predicate acts alleged were either unrelated or did not proximately cause DeGuelle's injuries. The Seventh Circuit found, however, that the Sarbanes-Oxley Act of 2002 ("SOX") and the Supreme Court's "continuity plus relationship" test supported an inference that the two acts were related, and therefore reversed the district court's decision. Id. at 204.

Over a period from December 2000 until July 2007, DeGuelle was instructed by his superiors to participate in various acts of tax fraud, as well as numerous RICO violations, including mail fraud and destruction of records. He typically stated his concerns about the legality of his actions, but ultimately complied with the requests. Finally, in October 2007, DeGuelle complained to the Human Resources ("HR") department about the ongoing fraud. After this report, DeGuelle's supervisors began to harass him and gave him negative performance reviews. Eventually, after repeated requests from SCJ to drop the issue which were not heeded, and after DeGuelle filed a whistleblower complaint with the Department of Labor, the company terminated DeGuelle in April 2009, allegedly for disclosing confidential business information.

DeGuelle filed a RICO lawsuit against SCJ, alleging multiple violations, including mail fraud, destruction of records, witness tampering, and illegally retaliating against him for reporting his concerns. The district court found that the alleged acts of retaliation were unrelated to the alleged acts of fraud – mail fraud, destroying records, and witness tampering. The court also held that the two "unrelated schemes" involved different actors, motives, and victims.

Under the district court's reasoning, however, retaliation could not possibly be related to the underlying wrongdoing for purposes of RICO because the retaliatory acts will always occur after the underlying wrongdoing has been disclosed. As the Court stated, "this is troubling when one considers the purposes of the Sarbanes-Oxley Act and its addition of § 1513(e) to RICO's statutory scheme." Id. at 201. The Court went on to hold that "accordingly, we believe a relationship can exist between § 1513(e) predicate acts and predicate acts involving the underlying cause for such retaliation. Such a finding is consistent with the Supreme Court's flexible standard and acknowledges the rationale behind the Sarbanes-Oxley Act's whistleblower provisions." Id.

Under that standard, the Seventh Circuit found that inasmuch as a temporal relationship existed between the predicate acts in this case, the acts "are interrelated by distinguishing characteristics and are not isolated events." As such there was a reasonable inference from the facts of the complaint that the actions against DeGuelle were part of the original conspirators' agreement to conceal their fraud, and therefore reversed and remanded. Id. at 203-04.

F. The Litigation Process

1. Arbitration

Section 922 of Dodd-Frank contains key provisions exempting SOX whistleblower claims from mandatory arbitration. As with other federal employment law statutes, employers often seek to avoid civil suit in federal court under SOX by requiring an employee to sign an agreement to arbitrate all claims. See, e.g., Ulibarri v. Affiliated Computer Services, 2005-SOX-46 and 47 (ALJ Jan. 13, 2006) aff'd ARB No. 07-003 (ARB July 31, 2008); Boss v. Salomon Smith Barney Inc., 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003) (nothing in the text or legislative history of the SOX evinces an intent to preempt the FAA). However, as part of its overall scheme of protecting the rights of whistleblowers and encouraging the reporting of corporate malfeasance, Section 922(c) of the Dodd-Frank Act invalidates any "agreement, policy form, or condition of employment, including a pre-dispute arbitration agreement" that has the effect of waiving rights and remedies available to SOX whistleblowers.

In Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225 (D. Mass. 2011), the District Court of Massachusetts held that the ban applied retroactively to SOX whistleblower claims. The plaintiff filed in District Court in January 2010, claiming he was wrongfully retaliated against in violation of SOX, after raising concerns relating to defendants' misconduct with securities transactions. The defendants raised the mandatory arbitration agreement contained in the plaintiff's employment agreement as an affirmative defense and moved to compel arbitration and either stay or dismiss the current action. On July 21, 2010, the Dodd-Frank Act enacted a bar to predispute arbitration agreements for whistleblower claims brought under SOX. The plaintiff argued that the arbitration clause was void; the defendants opposed, contending that the Dodd-Frank bar on SOX arbitration agreements did not apply retroactively.

The Court evaluated whether the clause banning arbitration should have retroactive effect according to the framework established by the United States Supreme Court in Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37–38 (2006), which asks first whether Congress expressly prescribed the statute's reach. In the absence of an express statement, the court applies the normal rules of statutory construction to infer the intent of Congress as to the statute's temporal reach. If Congress's intent is unclear, the court then asks "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." Id. If so, the court will apply the presumption against retroactivity.

In this case, the district court concluded that Congress did not state its express intent regarding retroactivity of Section 922 and, further, applying the normal rules of statutory construction, that its intent was unclear. The court thus moved to the final question, whether the statute would produce prejudicial retroactive consequence. The court acknowledged that Section 922 affects contractual and property rights because it would effectively void a contractual provision agreed upon by the parties in the employment agreement. The presumption against retroactivity usually applies in such instances because these statutes related to "matters in which predictability and stability are of prime importance." Id. at 233 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 271 (1994). However, the court determined that retroactive application was nonetheless appropriate because the arbitration ban is essentially a jurisdictional statute. The court explained that the parties did not claim that the choice of venue – the Financial Industry Regulatory Authority or a court – would affect the substantive result of the case, and, thus, "conclude[d] that Section 922 of the Act should also be applied to conduct that arose prior to its enactment."

The U.S. District Court for the District of Nevada addressed the same question and reached a different conclusion in Henderson v. Masco Framing Corp., No. 3:11-CV-00088, 2011

WL 3022535, at *3–4 (D. Nev. July 22, 2011). The Henderson court held that the Dodd-Frank Act's SOX provisions are not retroactive, disagreeing with the Pezza court's conclusion that retroactive application of Section 922 affected the conferral of jurisdiction rather than substantive contract rights. Id. at *4. Instead, the Nevada court found, "retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' or their earlier agreement." Id. (quoting Landsgraf). The only other court to address the question to date, the U.S. District Court for the District of Nevada, reached a different conclusion in Henderson v. Masco Framing Corp., 2011 WL 3022535, at *3–4. The Henderson court held that the Dodd-Frank Act's SOX provisions were not retroactive, disagreeing with the *Pezza* court's conclusion that retroactive application of Section 922 affected only the conferral of jurisdiction and not substantive contract rights. Id. at *4. Instead, the Nevada court found, "retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' or their earlier agreement." Id. (quoting Landsgraf).

Two other courts have declined to address the issue of whether the Dodd-Frank amendments to SOX Section 806 apply retroactively because they each dismissed on other grounds. See Wiest v. Lynch, No. 10-3288, 2011 WL 2923860, at *10 n.4 (E.D. Pa. July 21, 2011) (declining to address whether Section 929A would apply retroactively); Hiller v. Meritage Homes of Texas, *LLC*, No. 4:09-CV-4036, 2011 WL 1232065, at *6 n.3 (S.D. Tex. Mar. 31, 2011) (declining to address the issue of retroactivity because Meritage's motion to compel arbitration was denied on other grounds.").

2. Filing a Claim

In addition to expanding the scope of SOX coverage, Section 922(c) of the Dodd-Frank Act increases the statute of limitations for SOX whistleblower claims from 90 days to 180 days. The statute of limitations is strictly enforced by the courts and begins once the employee either experiences or has notice of an adverse action. See, e.g., Coppinger-Martin v. Nordstrom, Inc., ARB No. 07-067, 2007-SOX-19 (ARB Sept. 25, 2009) (rejecting complainant's argument that 90-day period did not begin to run because her employer misrepresented the reason for her termination and she had no reason to know that her termination had been in retaliation for engaging in SOX activity until after limitations period had expired); Corbett v. Energy East Corp., ARB No. 07-044, 2006-SOX-65 (ARB Dec. 31, 2008) (holding that "the date that an employer communicates to the employee its intent to implement the discharge or other discriminatory act marks the occurrence of a violation, rather than the date the employee experiences the consequences"); Salian v. Reedhycalog UK, ARB No. 07-080, 2007-SOX-20 (ARB Dec. 31, 2008) (holding that 90-day filing period commenced when complainant received a letter stating that his position was being made redundant in 30 days); Shelton v. Time Warner Cable, ARB No. 06-153, 2006-SOX-76 (ARB July 31, 2008) (dismissing complaint as untimely where complainant filed earlier complaints under ERISA and section 11(c) of the Occupational Safety and Health Act but did not allege SOX violation within 90 days); Rollins v. American Airlines, ARB No. 04-140, 2004-AIR-9 (ARB Apr. 3, 2007) (counting the 90 day period as beginning with an advisory letter which provided "final and unequivocal" notice of termination to the complainant, not the actual termination letter issued 5 days later, and finding the complaint untimely because complainant failed to file his complaint within 90 days of the advisory letter); Halpern v. XL Capital, Ltd., ARB No. 04-120, 2004-SOX-54 (ARB Aug. 31, 2005) (rejecting complainant's argument that he was entitled to tolling because he was unaware of unlawful motive for retaliatory action within the limitations period); Hickernell v. Penske Truck Leasing, Inc., 2008-SOX-00025 (ALJ Apr. 17, 2008) (strictly construing 90-day limit where complainant claimed to have delayed filing due to credible threats by agent of former employer). As these cases demonstrate, tolling of the statute of limitations is strongly disfavored, and one ALJ has held that even a tolling agreement entered into by the parties in furtherance of settlement negotiations was ineffective. See Szymonik v. TyMetrix Inc., 2006-SOX-50, (Mar. 8, 2006). In addition, a filing with another agency, even for the same adverse action, does not constitute a timely filing if it does not request relief for retaliation in violation of SOX. See Corbett v. Energy East Corp., ARB No. 07-044, 2006-SOX-65 (ARB Dec. 31, 2008) (dismissing as untimely a complaint timely filed with the National Labor Relations Board but not filed with OSHA within 90 days). Finally, while there is no written form required for timely filing, the complaint must be in writing and should include a full statement of the allegations, with relevant dates. See Shelton v. Time Warner Cable, ARB No. 06-153.

In Avlon v. American Express Co., ARB No. 09-089, ALJ 2008-SOX-051 (ARB Sept. 14, 2011), the ARB exercised its discretionary power to consider issues not raised by the petitioner below. Christine Avlon filed two complaints with OSHA, *pro se*, against American Express ("AMEX") after it terminated her employment. OSHA and the ALJ both dismissed her consolidated complaint as untimely because she had not filed within 90 days of a September 6, 2007, email from the director of human resources. The ARB reversed, finding that the September 6 email was equivocal and did not set a firm date for Avalon's termination. Subsequent email exchanges indicated that the date was uncertain and that Avlon might return to work. The ARB thus held that the ALJ's ruling that the first email had triggered SOX's statute of limitations was error as a matter of law, and that a later email had in fact triggered the statute of limitations.

AMEX petitioned for reconsideration, arguing that the ARB ruled on an issue – timeliness – for which Avlon did not petition for review and that she had therefore waived. The ARB acknowledged that issues not raised in the briefs may be considered waived, but it noted that courts have discretion to consider waived arguments when "necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." Id. at 5 (quotations and citations omitted). The ARB held that it had authority to review the claim because to do otherwise would be a manifest injustice, as it would likely result in the dismissal of Avlon's entire case and because no additional fact-finding was required.

The ARB again reiterated the need to be more lenient with *pro se* plaintiffs in Charles v. Profit Inv. Mgmt., ARB No. 10-071, ALJ No. 2009-SOX-040 (Dec. 16, 2011). The ARB reversed the ALJ's grant of summary judgment for the employer. In granting the motion for summary judgment, the ALJ concluded that Lisa Charles had failed to file a timely response to a motion, and that, regardless, Charles's employer was not covered by the provisions of the Sarbanes-Oxley Act of 2002 ("SOX"). The ALJ concluded that Charles had therefore failed to submit a viable complaint. The ARB reversed and remanded.

Charles was employed by Profit Investment Management ("PIM") as an office administrator from May 2004 until May 2008. During her employment, she reported Securities and Exchange Commission ("SEC") violations to Eugene Profit, the company's Chief Executive Officer. Profit later terminated her employment. Charles filed her SOX complaint with the Occupational Safety and Health Administration ("OSHA") in August 2008. OSHA denied her complaint, and Charles requested a hearing before an ALJ. PIM filed a motion to dismiss on December 10, 2009. The ALJ informed Charles that her response was due by January 8, 2010. Charles did not file her response until February 2010. She asserted that she did not file a timely response because she misunderstood the ALJ's scheduling order, and because respondents thwarted her attempts to complete discovery. The ALJ nevertheless granted the respondents' motion for summary judgment and dismissed the case on the basis that her response was not timely and that PIM is not a publicly-traded company and, therefore, not a covered employer under SOX. Id. at 2-3.

Addressing the timeliness issue, the ARB found that inasmuch as Charles was a *pro se* litigant, the ALJ should have specifically informed her of the consequences of failing to respond to respondents' motion in a timely manner. The ARB also found that Charles may have been denied her opportunity to make a timely response by the respondents' failure to provide complete answers to Charles's discovery requests. Because the record was unclear as to whether there a pending discovery dispute existed, and because the ALJ failed to instruct Charles on the record about the consequences of her failure to submit a timely response, the ARB reversed the ALJ's decision that the response was untimely and remanded to correct these issues. Id. at 4-5. The ARB also remanded on the issue of whether Charles was a protected employee, id. at 5-8, which is discussed infra, at 8.

3. Burdens of Proof

The statute provides that the burdens of proof in a Sarbanes-Oxley whistleblower case are identical to the burdens in cases arising under AIR 21's whistleblower provisions.[6] In Allen v. Administrative Review Board, 514 F.3d 468, the Fifth Circuit Court of Appeals provided an overview of the burdens of proof in SOX 806 claims:

[6] See 18 U.S.C.A. § 1514A(b)(2).

> The legal burdens of proof set forth in [AIR21], 49 U.S.C. § 42121(b), govern SOX whistleblower actions. 18 U.S.C. § 1514A(b)(2)(C). To prevail, an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. ...
>
> If the employee establishes these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv). This "independent burden-shifting framework" is distinct from the McDonnell Douglas burden-shifting framework applicable to Title VII claims. ...

Id. at 475-76.

4. Procedure before the DOL

After a claim has been filed, OSHA will then conduct an investigation if it determines that the employee has stated a *prima facie* case that his protected conduct was a contributing factor in an unfavorable employment action, and the employer has failed to rebut the claim by clear and convincing evidence. Otherwise, OSHA will dismiss the complaint.

Either party may appeal an adverse decision by OSHA to the Department of Labor's Office of Administrative Law Judges, which then conducts an administrative hearing preceded by discovery. The ALJ's decision can be appealed by the unsuccessful party to the Department of Labor's Administrative Review Board, with further appeal to the U.S. Circuit Court of Appeals for the circuit in which the employee resided or the violation allegedly occurred.[7]

This statutory enforcement scheme is comparable to those of other federal whistleblower statutes administered by the U.S. Department of Labor, with one significant exception: a party can remove the claim to federal court if the Department of Labor does not resolve the claim within 180 days. Jurisdiction vests with the district court when the case is filed. See Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir. 2005). This "kick-out" provision is discussed in more detail below.

[7] The ARB defers to ALJ's factual findings, especially where they are predicated on the ALJ's credibility determinations about the testimony of conflicting witness. See Halloum v. Intel Corp., ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31,2006).

5. SOX "Kick-Out" Provision

If the DOL has not issued a final decision within 180 days and the delay is not a result of the complainant's bad faith, the complainant may withdraw his or her administrative complaint and file an action for *de novo* review in federal district court. See 18 U.S.C.A. § 1514A (b)(1)(B) (claimant may seek relief, "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, [by] bringing an action at law or equity for de novo review in the appropriate district court"). The district court has jurisdiction without regard to the amount in controversy. Moreover, the same burdens of proof that apply before the ALJ apply in the district court. See 18 U.S.C. § 1514A(b)(2)(C).

In a recent decision denying respondent's motion to dismiss, the Fourth Circuit Court of Appeals emphasized that the federal courts' review of SOX 806 cases is *de novo* and thus that an ALJ's decision may not result in issue preclusion (also known as collateral estoppel). See Stone v. Instrumentation Lab. Co., 591 F.3d 239 (4th Cir. 2009). In Stone, the plaintiff had appealed a negative OSHA determination to the ALJ, who granted respondents' motion for summary decision on the merits. Id. at 242. Stone then appealed the ALJ's decision to the ARB, who established a briefing schedule. Id. One month before his initial brief before the ARB was due, Stone filed notice with the ARB that he intended to bring an action in federal district court, and then did so. Id. The U.S. District Court for the District of Maryland then granted defendants' 12(b)(6) motion to dismiss based upon preclusion principles, reasoning that Stone had had a full and fair opportunity to litigate his claims before the ALJ and that the ALJ's decision was a "final judgment on the merits." Id. Analyzing the plain language of the statute, the Fourth Circuit concluded that if the ARB accepts a party's petition for review, the ALJ's decision is inoperative until the ARB adopts the decision. Id. at 244 (citing 29 C.F.R. § 1980.110(b)). In such case, if 180 days or more have passed since the filing of the complaint and the ARB has not adopted the ALJ's decision, there is no final decision on the merits and, pursuant to 18 U.S.C. § 1514A (b)(1)(B), a party may appeal the ALJ's decision to the appropriate district court for *de novo* review. Id. at 245.

According to SOX implementing regulations, fifteen days in advance of filing an action in district court, the complainant must file notice with the ALJ or ARB of his or her intention to file such a complaint, and serve such notice upon all parties. 29 C.F.R. § 1980.114(b). In some cases the fifteen-day notice requirement has been strictly enforced. See, e.g., Levi v Anheuser-Busch Co., Inc., No. 08-00398, 2008 WL 4816668 (W.D. Mo. Oct. 27, 2008) (refusing review of ARB decision where complainant failed to give required notice). A recent case from the Southern District of New York, however, held that neither SOX 806 nor its implementing regulations conditions the district courts' jurisdiction on providing 15 days' notice. Rather, the court held:

> Because deference is not given to administrative regulations that narrow Congress's statutory grant of jurisdiction to district courts, a district court can properly exercise jurisdiction over a whistleblower claim under SOX even when no notice is given to the ALJ in contravention of the DOL's fifteen-day notice requirement.

Lebron v. American Int'l Group, Inc., No. 09 Civ. 4285, 2009 WL 3364039, at *4 (S.D.N.Y. 2009).

The ARB also recently ruled that the heightened pleading standard that the Supreme Court established in Twombly and Iqbal[8] for cases filed in federal district court was inapplicable to SOX whistleblower claims initiated with OSHA. Sylvester v. Parexel, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, at 12 (ARB May 25, 2011). But see Stone v. Duke Energy Corp., No. 3:03-CV 256 (W.D.N.C. Feb. 11, 2004) (dismissing the plaintiff's SOX complaint for failure to contain "a short and plain statement of the claim" and failure to present claims in separate counts for clear presentation of the matters set forth). Unlike the Federal Rules of Civil Procedure, DOL regulations require "no particular form of complaint," except that the complaint must be in writing and should contain a full statement of the acts and omissions believed to constitute violations, and their relevant dates. 29 C.F.R. § 1980.103(b). Thus, a heightened pleading requirement would impermissibly force SOX complainants to file the equivalent of a federal court complaint when they first initiated contact with OSHA.

The ARB pointed out that the DOL had expressly rejected such a heightened standard at the complaint stage when it promulgated SOX's regulations, and that this standard would contravene OSHA's explicit duty to interview the complainant, obtain additional evidence and otherwise supplement the complaint through its investigation. Further, the ARB explained:

> SOX claims are rarely suited for Rule 12 dismissals. They involve inherently factual issues such as "reasonable belief" and issues of "motive." . . . ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort. Dismissal is even less appropriate when the parties submit additional documents that justify an amendment or further evidentiary analysis.

Sylvester, ARB No. 07-123, at 13. The ARB stressed that Rule 12 motions are "highly disfavored" and "impractical" in the DOL process, in part because the regulations governing the handling of whistleblower complaints by the DOL's administrative law judges do not contain a rule analogous to Rule 12. Id. at 13.

Since the ARB's decision in Sylvester, OSHA has issued its revised investigations

[8] See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. ---, 129 S. Ct. 1937 (2009).

manual that clarifies that employees may file oral complaints under all 21 whistleblower statues, including SOX. See OSHA Manual ("Although the implementing regulations for a few of the whistleblower statutes indicate that complaints must be filed 'in writing,' [including SOX] that requirement is satisfied by OSHA's longstanding practice of reducing all orally-filed complaints to writing.") (footnotes omitted).

Complainants must exhaust their administrative remedies before filing a complaint in federal court. 18 U.S.C. § 1514A(b)(1)(A). In McClendon v. Hewlett-Packard Co., No. CV-05-87-S-BLW, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), plaintiff's complaint alleging defendant took away his job duties was untimely under OSHA's 90-day administrative filing period. Plaintiff opted out of the DOL forum and filed an action in the district court, alleging he was not time-barred from asserting other adverse employment actions. The court stated each discriminatory act starts the clock for filing an OSHA complaint. Since plaintiff's additional adverse employment actions were not asserted in his OSHA complaint, the court could not review them. The district court later denied plaintiff's motion for reconsideration on this point and noted that plaintiff did not even attempt or request to file an amended complaint while his claim was pending in the DOL. See McClendon v. Hewlett-Packard Co., No. CV-05-087-S-BLW, 2006 WL 318813 (D. Idaho Feb. 9, 2006).

District courts have jurisdiction to stay SOX proceedings, but after a complainant has filed in district court the ARB does not. In Allen v. Stewart Enters., Inc., No. 05-4033 (E.D. La. Apr. 6, 2006), a Louisiana federal district court acknowledged its authority to stay federal proceedings and to reinstate the proceedings to the Department of Labor. In doing so, the Court looked beyond the statute's plain language to traditional legal principles of issue preclusion to avoid the absurd result of re-litigating an entire case where the plaintiffs had already fully litigated the matter before the ALJ and had requested a review. In Kelly v. Sonic Automotive, Inc., ARB No. 08-027, 2008-SOX-3 (ARB Dec. 17, 2008), the complainant filed in district court 30 days after filing with the ALJ, and the ALJ refused to stay proceedings as the complainant requested. The ARB held that the Department of Labor was deprived of jurisdiction once the complainant filed in district court, so even if the ALJ had agreed to a stay of proceedings so the complainant could file in district court, the stay would have become ineffective once the filing was made. Id.

A related issue arises when a complainant pursues claims in other fora based on the same facts and seeking similar relief as the SOX claim. This issue is particularly relevant in the SOX context because SOX retaliation claims potentially give rise to other securities-related or shareholder derivative litigation as well as related actions under state whistleblower protection statutes. The text of SOX suggests that its whistleblower provisions do not preempt such state laws. See 18 U.S.C.A. § 1514A(d). Case law supports the view that state and SOX 806 claims are not mutually exclusive. For example, in Gonzalez v. Colonial Bank, 2004-SOX-39 (ALJ Aug. 9, 2004), the complainant filed a SOX whistleblower complaint with OSHA and several days later a state whistleblower action seeking similar relief on the same facts, which the respondent removed to a federal district court in Florida. The ALJ rejected respondent's argument that complainant was precluded from pursuing his OSHA claim because allowing the

SOX case to proceed would have constituted impermissible "claim-splitting." The ALJ held that complainant's case was not barred by *res judicata* or claim-splitting as there was no prior judgment, the SOX claim was filed first, and, most significantly, because the SOX action differed materially from the Florida whistleblower action.

6. Right to Jury Trial

In addition to expanding the statute of limitations for SOX complaints, Section 922(c) of the Dodd-Frank Act explicitly provides SOX whistleblowers with the right to a jury trial in federal court. Previously, SOX did not expressly provide for a jury trial, and courts generally agreed that no right to a jury trial existed under SOX 806 prior to the enactment of the Dodd-Frank Act. See, e.g., Schmidt v. Levi Strauss & Co., No. 5:05-cv-01026 (N.D. Cal. Mar. 28, 2008); Walton v. Nova Information Systems, 514 F.Supp.2d 1031 (E.D. Tenn. 2007).

G. Available Remedies

The goal of SOX remedies is to make the employee whole. In other words, the intention is to put the employee in the same financial and employment state she would have been in but for the respondent's illegal actions. Accordingly the Department of Labor may provide a broad range of remedies in successful SOX cases, such as reinstatement, back pay with interest, and compensation for special damages, including litigation costs, expert witness fees, and reasonable attorney's fees.

1. Reinstatement

A logical form of restitution under SOX is reinstatement of a wrongly terminated complainant. The Updated OSHA Whistleblower Investigation Manual provides, "Under all whistleblower statutes enforced by OSHA, reinstatement of the complainant to his or her former position is the presumptive remedy in merit cases and is a critical component of making the complainant whole." OSHA Manual, at 6-1. The Department of Labor has begun ordering reinstatement with some regularity. For example, OSHA ordered reinstatement and awarded damages to two SOX whistleblowers on consecutive days in September 2011, something that would have been unheard of during previous years. OSHA ordered Bond Laboratories, a manufacturer of nutritional supplement beverages, to pay approximately $500,000 in back pay and to reinstate an officer it found was illegally terminated for repeatedly objecting to the manipulation of accounting data that was presented to potential investors. Press Release, OSHA, U.S. Department of Labor Finds Nutritional Beverage Company, Former CEO in Violation of Sarbanes-Oxley Act Whistleblower Protection Provisions (Sept. 15, 2011). Likewise, it ordered the reinstatement and compensation of a Countrywide whistleblower fired shortly after the company merged with Bank of America in 2008. The whistleblower conducted an investigation of Countrywide in 2007 and found fraud spread throughout the entire region involving "pervasive wire, mail and bank fraud," which he then reported to the company's Employee Relations Department. Press Release, OSHA, U.S. Department of Labor Finds Bank of American in Violation of Sarbanes-Oxley Whistleblower Provisions (Sept. 14, 20110). OSHA found that his termination was a direct consequence of his whistleblowing. OSHA has ordered Bank of America to pay the employee $930,000 as to indemnify him for back wages, compensatory damages, and attorney fees.

There continues to be some question of whether preliminary reinforcement orders are enforceable. Very few courts have addressed the enforceability of preliminary reinstatement orders issued under SOX. None has ruled that the federal courts lack jurisdiction to enforce preliminary orders of reinstatement. The leading case on the issue, Bechtel v. Competitive Technologies, Inc., 448 F.3d 469 (2nd Cir. 2006), declined to enforce an order of reinstatement without any agreement amongst the three Judges on the panel as to the reason. Only Judge Jacobs concluded that the district court lacked jurisdiction to enforce a preliminary order of reinstatement. Id. at 470-76. Judge Leval concurred in the result but on the basis that the defendant had been denied due process before OSHA, making the order invalid. Id. at 476-81. Judge Straub dissented, writing that the district court had jurisdiction to enforce a preliminary order of reinstatement. Id. at 483-90. Thus, while the district court below was overruled on its ruling regarding the enforceability of the particular order at issue, the district court *was not* overruled on its jurisdictional ruling.

A similar result was reached in the Sixth Circuit. In Solis v. Tenn. Commerce Bancorp, Inc., 713 F. Supp. 2d 701, (M.D. Tenn. 2010), the District Court held that it had jurisdiction to enforce the Secretary's order of preliminary reinstatement and issued a preliminary injunction, requiring the immediate reinstatement of the complainant. The defendants then appealed to the Sixth Circuit and moved for a stay pending appeal. The defendants argued that the district court did not have jurisdiction to enforce preliminary orders issued under the procedures set forth in 49 § U.S.C. 42121(b)(2). The Sixth Circuit noted that, "[t]he district court's authority, therefore, turns on whether a preliminary reinstatement order is an order issued under paragraph (3) for the purposes of judicial enforcement. This issue of first impression on this court has been addressed only once in a published court of appeals decision, Bechtel v. Competitive Techs., Inc., 448 F.3d 469 (2d Cir. 2006), a case in which the three judges had three different takes on the issue." Solis v. Tenn. Commerce Bancorp., Inc, No. 10-5602, slip op. at 2 (May 25, 2010). The Sixth Circuit noted that "the defendants' motion for a stay raises a substantial question as to the authority of the district court to issue the preliminary injunction, but applied "traditional injunctive relief standards," and granted the stay because it was supported by a balancing of the harms. Id. at 2. In October 2010, the parties jointly moved for dismissal. Thus, the Sixth Circuit never reached the jurisdictional question on the merits. The Sixth Circuit, like the Second Circuit, reached no holding as to the enforceability of preliminary reinstatement orders.

Finally, in Welch v. Cardinal Bankshares, 407 F. Supp. 2d 773 (W.D. Va.), the district court granted the defendants' motion to dismiss the complainants' enforcement proceeding, holding that, due to confusion throughout the administrative process and the orders issued by the ALJ, "there [wa]s not a preliminary order of reinstatement for th[e] court to enforce." Therefore, it found "it unnecessary to consider whether it would have had the authority to enforce the preliminary order of reinstatement had such an order been properly entered." Id.

In Windhauser v. Trane, ARB No. 05-127, ALJ No. 2005-SOX-17 (ARB Oct. 31, 2007), OSHA issued a preliminary order of reinstatement. The ALJ denied the Respondent's motion to stay the order of reinstatement, and the ARB denied review of the ALJ's order because it was an interlocutory appeal. Id. Following a settlement approved by the ALJ, the ALJ imposed monetary sanctions on the respondent for refusal to comply with OSHA's preliminary order of reinstatement, awarding the complainant the expected salary and bonuses due during the period between the issuance of the preliminary order of reinstatement and the order approving the settlement. Id. The ALJ awarded the Complainant a pro rata portion of his salary and expected bonus for the months from the preliminary order of reinstatement to the settlement of the case. The respondent appealed, and the ARB held that only the federal district courts, not the ALJ, had the power to levy economic sanctions against a respondent. Id. The ARB therefore vacated the sanction. Id.

2. Front Pay

At least two ALJs have held that front pay is an available remedy under certain circumstances. See Hagman v. Washington Mutual Bank, Inc., 2005-SOX-73 (ARB May 23, 2007); Kalkunte v. DVI Financial Services, Inc., 2004-SOX-56 (ALJ July 18, 2005). In Hagman, the ALJ noted that the complainant's rejection of her employer's offer of reinstatement was objectively reasonable because of the open hostility exhibited by her managers and the unlikelihood of a functional work environment upon her return. Id. Moreover, the employer had not moved the harasser, instead placing him in a position immediately above the complainant, and the employer had failed to institute any changes that would prevent retaliation or even the fraud and credit problems the complainant had complained about in the first place. Id. Based on these factors, the ALJ imposed a higher standard of evidentiary proof on the respondent to show by clear and convincing evidence that reinstatement was the appropriate remedy. Id. The respondent could not meet that burden, and so the ALJ held that an award of front pay was appropriate. Id. In calculating front pay, the ALJ noted that since the complainant was only in her 40s, front pay until retirement was inappropriate. Id. Rather, based on evidence that included statements by financial experts, the ALJ held that an award of 10 years' front pay was appropriate because the complainant would almost certainly recover her career track within that time. Id.

The updated OSHA manual provides that front pay is appropriate when reinstatement is not feasible. OSHA Manual, at 6-1. It states that it "should be awarded from the date of discharge up to a reasonable amount of time for the complainant to obtain another job." Id.

3. Compensatory and Special Damages

Some courts have held that monetary damages in SOX cases are intended to be restitutionary, restoring prevailing plaintiffs to the status quo that would have existed but for the employer's discriminatory actions, rather than intended to compensate the complainant. See,, e.g., Schmidt v. Levi Strauss & Co., 621 F. Supp. 2d 796 (N.D. Cal. 2008) (holding that SOX's remedial provision specifically identifies back pay with interest and compensation for special damages stemming from the respondent's illegal retaliation; it does not provide for a broad claim of monetary damages). OSHA, however, takes the position that "[c]ompensatory damages may be awarded under all the OSHA whistleblower statutes." OSHA Manual, at 6-2. The Manual then lists a lengthy but inexhaustive list of things which qualify as compensatory damages. Id.

As noted above, in addition to reinstatement, OSHA recently awarded two different whistleblowers significant damage awards, including compensatory damages. OSHA ordered Bond Laboratories to pay approximately $500,000 in back pay, interest, and compensatory damages, Press Release, OSHA, U.S. Department of Labor Finds Nutritional Beverage Company, Former CEO in Violation of Sarbanes-Oxley Act Whistleblower Protection Provisions (Sept. 15, 2011), and ordered Bank of America to pay the employee $930,000 to indemnify him for back wages, compensatory damages and attorney fees. Press Release, OSHA, U.S. Department of Labor Finds Bank of American in Violation of Sarbanes-Oxley Whistleblower Provisions (Sept. 14, 20110). OSHA found that his termination was a direct consequence of his whistleblowing.

Difficulty in calculation of benefits can operate as a factor in denying special and compensatory damages. In Platone v. Atlantic Coast Airlines Holdings, Inc., 2003-SOX-27 (ALJ July 13, 2004), overruled on other grounds, ARB No. 04-154 (ARB Sept. 29, 2006), a complainant sought to include in her back pay award damages for 401(k) participation and the value of free and discounted airline tickets provided to employees. At the time of her termination, the complainant had not yet enrolled in the 401(k) program, so the court was unable to determine how much she would have contributed to the plan or if she would have invested at all. Id. Similarly, with regard to the plane tickets, there was no way to assign a value to airline tickets that the complainant might have purchased at a discount or received for free because there was no way to know how often or in what way she would have taken advantage of the program. Id. Thus neither potential benefit was accepted as a component of back pay.

In a unique case, the ALJ noted that successful plaintiffs may be able to recover the value of lost stock options if pled with specificity. See Jayaraj v. Pro-Pharmaceuticals, Inc., 2003 SOX 32 (ALJ Feb. 11, 2005). The ALJ held that this was an appropriate remedy to make the complainant whole, since the stock options would have been available to the complainant but for the respondent's actions.

4. Attorneys' Fees

Attorneys' fees are another remedy available to successful SOX complainants. Two cases mentioned above addressed appropriate calculations of attorneys fees. First, in Hagman v. Washington Mutual Bank, Inc., 2005-SOX-73 (ALJ Dec. 19, 2006), the ALJ held that the appropriate rates for calculating attorneys' fees were based on the geographic market in which the proceedings took place, barring exceptional circumstances. Thus, although the complainant retained a New York firm, because the OSHA hearing ultimately took place in southern California, the ALJ awarded attorneys' fees at the Altman Weil Survey of Law Firm Economics rate for Los Angeles. Id. The ALJ in Platone, 2003-SOX-27 (overruled on other grounds) also used the Altman Weil Survey. Platone also identified other, more subjective factors to consider in determining appropriate rates for attorneys' fees awards: the complexity of the issues presented; the lead attorney's experience; and the quality of the attorneys' performance at trial. Id. The ALJ applied a rule of reasonability, taking into account these particular factors and the totality of the circumstances in determining that the rates requested in the fee petition were objectively reasonable and within the market range. Id.

5. Punitive Damages Not Available

Punitive damages are not available under the whistleblower provisions of SOX. See Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444, at *4 (N.D. Tex. June 7, 2005) (reviewing the legislative history and noting that the omission of punitive damages from the statute is clear and unequivocal); Hanna v. WCI Communities, Inc., 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (same).

6. Non-Economic Damages

The district courts are split as to whether SOX gives plaintiffs the right to non-economic damages, also referred to as legal damages, to provide redress for harm to reputation, emotional, mental or physical distress and anxiety. The Administrative Review Board ("ARB") has indicated that complainants may recover for emotional distress. See Kalkunte v. DVI Financial Services, Inc., 2004-SOX-56 (ARB Feb. 27, 2009) (affirming Administrative Law Judge ("ALJ") award for "pain, suffering, mental anguish, the effect on her credit [because of her loss of employment] and the humiliation that she suffered."). The majority of courts that have addressed whether SOX provides damages for reputational injury have held that "because reputational damages are not specifically enumerated in SOX and such damages are non-pecuniary, reputational damages are akin to damages for emotional distress and are not recoverable under SOX." See Jones v. Home Fed. Bank, No. CV09-336-CWD, 2010 WL 255856 (D. Idaho Jan. 14, 2010) (collecting cases). In Walton v. Nova Information Systems, 514

F.Supp.2d 1031 (E.D. Tenn. 2007), the district court granted respondent's motion to strike plaintiff's claims for non-economic damages which included harm to her career and reputation, emotional, mental and physical distress and anxiety and punitive damages. In reaching its holding, the court declined to accept Walton's argument that the "action at law" phrase in the enforcement provision of SOX made jury trials available for Section 806 retaliation claims, and noted that such legal damages were questions for juries, which as noted above, courts have held are not available in SOX 806 actions. See also Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444 (N.D. Tex. June 7, 2005) (granting defendants' Motion to Strike Plaintiff's Demand for a Jury Trial where plaintiff sought from a jury damages for reputational injury and punitive damages, both of which plaintiff was seeking from a jury).

However, the district court in Jones v. Home Fed. Bank, found that "allowing a plaintiff to claim damages for a reputational injury that caused a decrease in the plaintiff's future earning capacity could be consistent with SOX's goal of making the plaintiff whole." 2010 U.S. Dist. LEXIS 3579 at *16. See Mahony v. KeySpan Corp., No. 04-CV-554, 2007 U.S. Dist. LEXIS 22042 (E.D.N.Y. Mar. 12, 2007; Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (finding that "a successful Sarbanes-Oxley Act plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity.").

Recently, in Brown v. Lockheed Martin Corp., ARB No. 10-050, ALJ No. 2008-SOX-00049 (ARB Feb. 28, 2011), the ARB affirmed the ALJ's award of compensatory damages for emotional pain and suffering without the testimony of a medical or psychiatric professional. Andrea Brown, the former Communications Director for Lockheed Martin Corporation in Houston, Texas, learned that the Vice President of Communications, Wendy Owen, had developed sexual relationships with several soldiers who were participants in Lockheed's "Pen Pal" program. Owen had visited welcome-home ceremonies on the pretext of business to have sexual affairs with the soldiers, purchasing luxury hotel rooms, limousine transportation, and resort access for her encounters, using Lockheed's money.

After Brown's anonymous complaint about Owen's behavior, her work environment worsened significantly. She was place under a hostile supervisor, stripped of her duties, her title, and her parking space, and made to work from home. Things devolved to the point that Brown went on medical leave, suffering from an emotional breakdown and deep depression.

OSHA denied Brown's claims of constructive discharge, but on appeal the ALJ ruled in her favor, finding that a reasonable person would have felt forced to resign under the same circumstances. The ALJ ordered Brown reinstated and a payment of $75,000 in compensatory damages. The ALJ reasoned:

> Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation under 29 C.F.R. § 1980.109(b). The

> testimony of medical or psychiatric experts is not strictly necessary. However, damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. . . . Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. [Three additional witnesses] all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible. In line with awards made in similar cases, I hereby award Complainant the sum of $75,000.00 as non-economic compensatory damages.

Brown v. Lockheed Martin Corp., 2008-SOX-00049, 54–55 (ALJ Jan. 1, 2010) (internal citations omitted).

The Brown case is important both because the ARB upheld an award of compensatory damages under SOX and because it upheld such an award that the ALJ had made without testimony from medical of psychiatric professionals, but rather based only on the testimony of the plaintiff, her coworkers, and her son.

The Brown decision is consistent with OSHA's position that "compensation for mental distress due to the adverse action, and out-of pocket costs of treatment by a mental health professional and medication related to mental distress" are recoverable as compensatory damages. OSHA Manual at 6-2.

II. THE DODD-FRANK ACT

On July 15, 2010, Congress enacted a massive overhaul of the nation's financial regulatory system. President Barack Obama signed the bill into law on July 21, 2010. Congress designed the Wall Street Reform and Consumer Protection Act – popularly known as the Dodd-Frank Act –to address some of the root causes of the collapse of the financial sector in 2008. As part of its comprehensive program to ensure corporate accountability and compliance, the Dodd-Frank Act strengthened and created numerous whistleblower protections. As noted in Section I above, Congress expanded the whistleblower protection provision of the Sarbanes-Oxley Act ("SOX 806") by extending the statute of limitations, clarifying the scope of coverage and right to a private civil action, and ensuring that the protections of SOX 806 were non-waivable by employees in most cases. The Dodd-Frank Act also created a Securities and Exchange Commission ("SEC") whistleblower incentive program, as well as a Commodity Futures Trading

Commission ("CFTC") whistleblower incentive program, both of which reward those who provide information to the government on securities violations by giving whistleblowers a share of any money the government recovers. It also created a specific whistleblower-protection program for those who work in the financial industry to encourage them to come forward with information related to fraudulent conduct in the sale and marketing of consumer financial products or services. As detailed below, the Dodd-Frank Act also strengthened the False Claims Act and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

A. Commodity Futures Trading Commission Whistleblower Incentive Program

Section 748 of the Dodd-Frank Act amends the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, to create an incentive program for whistleblowers who provide original information to the CFTC that results in the imposition of monetary sanctions greater than $1 million. The statutory language establishing this incentive program is as follows:

> In any **covered judicial or administrative action**, or **related action**, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an **award** or awards to 1 or more **whistleblowers** who voluntarily provided **original information** to the Commission that led to the **successful enforcement** of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

Section 748 states that the whistleblower's financial reward for the provision of such original information shall be not less than 10 percent and not more than 30 percent of the total collected monetary sanctions from the offending party. The CFTC maintains discretion in determining the size of the whistleblower's financial reward. In crafting this reward, the CFTC will consider the significance of the information provided, the extent of the whistleblower's assistance, the programmatic interests of the SEC, and any other relevant factor that the CFTC establishes by subsequent rule or regulation.

The Dodd-Frank Act further defines these bolded CFTC Whistleblower Program terms as follows:

- **Covered judicial or administrative action:** Any judicial or administrative action brought by the CFTC under the Commodity Exchange Act that results in **monetary sanctions** in excess of $1,000,000.

- **Monetary Sanctions**: these sanctions include any monies, including penalties, disgorgement, restitution, and interest ordered to be paid, as well as any monies deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the

Sarbanes Oxley Act of 2002 as a result of such action or any settlement of such action.

- **Whistleblower**: any individual (or individual*s* acting jointly) who provides information relating to a violation of the Commodity Exchange Act in a manner established by rule or regulation of the CFTC.

- **Original Information** is information that is:

  (A) derived from the independent knowledge or analysis of a whistleblower;

  (B) not known to the CFTC from any other source, unless the whistleblower is the original source of the information; and

  (C) not exclusively derived from an allegation made in a (1) judicial or administrative hearing, in a (2) governmental report, hearing, audit, or investigation, or (3) from the news media, unl**ess** the whistleblower is a source of the information.

  Additionally, original information triggers the CFTC whistleblower program so long as the original information was submitted to the CFTC after the date of enactment of the Dodd-Frank Act.

  Moreover, awards issued pursuant to the CFTC Whistleblower Program are available to whistleblowers who provided timely original information to the CFTC even where the violation of the Commodities Exchange Act (or its implementing rules and regulations) occurred prior to the enactment of the Dodd-Frank Act.

- **Successful enforcement**: Successful enforcement includes any settlement of covered actions.

As stated above, the CFTC whistleblower's award shall be not less than 10 percent and not more than 30 percent of the total monetary sanctions that have been collected as imposed via the covered action or related actions. The determination of this award rests within the discretion of the CFTC. The Dodd-Frank Act lists certain criteria that should guide the CFTC's discretion. These criteria include: (1) the significance of the CFTC whistleblower's information to the success of the covered judicial or administrative action against the wrongdoer; (2) the degree of the CFTC whistleblower's assistance (as well as the assistance of the whistleblower's legal representative); (3) the CFTC's programmatic interest in deterring violations of the Commodity Exchange Act (and its implementing regulations); and (4) additional relevant factors as established by a rule or regulation of the CFTC.

The Dodd-Frank Act envisions numerous scenarios in which an individual's employment precludes that person from eligibility as a CFTC whistleblower. These scenarios include any individual who is or was at the time of acquiring the original information submitted to the CFTC a members/officer/employee of the following: Appropriate regulatory agency; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization under Securities Exchange Act (e.g., Financial Industry Regulatory Authority [FINRA]); or a law enforcement organization.

The Dodd-Frank Act also disallows awards to any whistleblower convicted of a criminal violation related to the covered judicial/administrative action that produced the award. Whistleblowers are not eligible for awards where the whistleblower submits information to the CFTC that is based on facts underlying the covered action previously submitted by another whistleblower. Finally, the Dodd-Frank Act prohibits awards to any whistleblower who fails to submit information to the CFTC in such a form as required by CFTC rule or regulation.

The Dodd-Frank Act permits a whistleblower to be represented by counsel when making a claim for an award under the CFTC Whistleblower Program. Additionally, the whistleblower may initially remain anonymous and act through his or her counsel, provided that the whistleblower eventually discloses his or her identity to the CFTC prior to the payment of the award.

Unlike Section 922 of the Dodd-Frank Act (the SEC Whistleblower Program), Section 748 permits CFTC whistleblowers to appeal any award determination of the CFTC. The whistleblower-appellant must file an appeal with the appropriate Circuit Court of Appeals not more than 30 days after the CFTC issues its award determination.

Section 748 of the Dodd-Frank Act also creates a private right of action for CFTC whistleblowers who experience adverse personnel actions on account of protected activity. This anti-retaliation protection provision protects whistleblowers who provide information to the CFTC in accordance with the above-described CFTC whistleblower program, or whistleblowers who assists in any CFTC investigation or judicial/administrative action that is based upon or related to the whistleblower's provision of information.

Section 748's anti-retaliation protection provision permits a non-federal government employee to bring an action against the employer in federal district court. Federal government employees must bring the action pursuant to Section 1221 of Title 5 of the U.S. Code. Whistleblowers must bring the action no later than two years after the date of the adverse personnel action occurs**.** A successful whistleblower is entitled to reinstatement, backpay and interest, compensation for special damages, litigation costs, expert witness fees, and reasonable attorneys' fees.

B. Securities and Exchange Commission (SEC) Whistleblower Incentive Program and Anti-Retaliation Provisions

Section 922 of the Dodd-Frank Act amends the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, to create a new federal program by which the Securities and Exchange Commission ("SEC") will reward whistleblowers who voluntarily provide original information to the SEC regarding securities violations that result in the imposition of monetary sanctions greater than $1 million.

The provisions of Section 922 are a near mirror to the provisions of Section 748's CFTC Whistleblower Incentive Program described above. Section 922 states that the whistleblower's financial reward for the provision of such original information shall be not less than 10 percent and not more than 30 percent of the total collected monetary sanctions from the offending party. As is the case with the CFTC, the SEC maintains discretion in determining the size of the whistleblower's financial reward. In crafting this reward, the SEC will consider the significance of the information provided, the extent of the whistleblower's assistance, the programmatic interests of the SEC, and any other relevant factor that the SEC establishes by subsequent rule or regulation. However, unlike the CFTC Whistleblower Incentive Program, SEC Whistleblowers have no right to appeal the SEC whistleblower award to federal court.

Section 922 specifically forbids awards to whistleblowers who were employees of an "appropriate regulatory agency," the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization. Section 922 also prohibits financial rewards to whistleblowers who are convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information, individuals who gain the original information by auditing financial statements as required under the securities laws and individuals who fail to submit information to the SEC as required by an SEC rule.

In addition to creating the federal program to encourage the reporting of securities violations, § 922 protects employees against retaliation when these employees provide information about their employer to the SEC in accordance with the program, or when these employees initiate, testify or assist in any investigation related to the program, or make required disclosures under SOX, the Securities Exchange Act of 1934, and any other law, rule, or regulation under the jurisdiction of the SEC. The Act creates a private right of action that may be filed in federal court.

The remedies available to an aggrieved whistleblower vary slightly from the remedies available to the CFTC whistleblower. Under Section 922, whistleblower's remedies under this new provision include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses.

C. Whistleblower Protections for Financial Services Employees

Section 1057 of the Dodd-Frank Act creates a new private cause of action for financial services industry employees who experience retaliation for disclosing information regarding an employer's fraudulent or unlawful conduct related to the provision of a consumer financial product or service.

1. Covered Employers and Employees

Section 1057 covers employers who engage in the offering or provision of a consumer financial product or service. This applies to a wide array of employers, including organizations that extend credit or service or broker loans, provide financial advisory services to consumers regarding proprietary financial products, provide real estate settlement services or perform property appraisals, or analyze, collect, maintain, or provide consumer report information in connection with any decision related to the offering or provision of a consumer financial product or service. The scope of coverage also encompasses affiliates who provide a related material service to the employer, including the design, maintenance, and/or operation of the financial product or service, or for the processing of related transactions. Covered services and employment included property appraisals, financial advisory services, credit counseling, credit rating, real estate settlement, and loan underwriting. Covered Employees include any individual who performs tasks related to the offering/provision of a consumer financial product or service.

2. Protected Activity

Section 1057 prohibits retaliation for four types of whistleblowing activities. First, Section 1057 protects a covered employee who provides, causes to be provided, or is about to provide or cause to be provided information to the employer, the Consumer Financial Protection Bureau ("Bureau"), or any other state, local, or federal government authority or law enforcement agency, relating to any violation of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. This type of protected activity includes the employee's provision of information regarding an act or omission that the employee reasonably believes to be a violation of these provisions and rules; testimony in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. Id.

Second, covered employees are protected under Section 1057 if they testify or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Act or any rule, order, standard or prohibition prescribed or enforced by the Bureau. Third, Section 1057 protects covered employees who file or institute any proceeding under any federal consumer financial law.

Finally, the fourth form of protected activity under the Section 1057 protects internal whistleblowers. Section 1057 protects a covered employee if he or she objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of, or enforceable, by the Bureau.

It is important to note that Section 1057's anti-retaliation prohibition protects employees or authorized representatives both when that employee/representative acts in the foregoing manners on her own initiative, or instead during the employee's execution of her duties in the normal course of affairs.

3. Prohibited Retaliation

Under Section 1057, covered employers may not "terminate or in any other way discriminate against, or cause to be terminated or discriminated against" covered employees for engaging in protected activity.

4. The Litigation Process

The statute of limitations for the new private cause of action under § 1057 is 180 days. An employee must file their claim with the Occupational Safety Health Administration ("OSHA"). OSHA will then inform the person(s) named in the Complaint of the allegations and provide an opportunity for written response. OSHA will initiate its investigation within 60 days after the filing of the Complaint.

Section 1057 tracks many of the same provisions of the Sarbanes Oxley Act anti-retaliation provisions, where within 60 days of receipt of the complaint, the Secretary of Labor may order relief upon a finding of reasonable cause that retaliation occurred. Furthermore, Section 1057 contains an employee-friendly burden-shifting framework; a complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was "a contributing factor" in the unfavorable action. The employer must then prove by clear and convincing evidence that it would have executed the same adverse employment action even in the absence of the employee's protected activity. Parties may file objections to the Secretary of Labor's written determination no later than 30 days after issuance, and request a hearing.

As is the case with other federal whistleblower protections, both the employee and the employer can appeal OSHA's findings and request a hearing before a Department of Labor ("DOL"). If the DOL fails to issue a final order within 210 days of filing, the employee can remove his or her § 1057 claim to federal court. Either party can then request a trial by jury.

5. Available Remedies

An employee who prevails under an action brought pursuant to Section 1057 is entitled to the following relief: reinstatement or front pay; back pay with interest; compensatory damages; attorneys' fees; and litigation costs, expressly inclusive of expert witness fees.

D. New Cause of Action

Section 922 of the Dodd-Frank Act also created a new cause of action, set forth in Section 21F(h)(1)(A),[9] which allows "whistleblowers" to sue in federal court if their employers retaliated against them because they provided information about their employer to the SEC in accordance with the above-described whistleblower bounty program, initiated, testified, or assisted in any investigation related to the program; or made disclosures "required or protected" under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC.

A Dodd-Frank retaliation claim may be filed directly in federal court within three years "after the date when facts material to the right of action are known or reasonably should have been known to the employee" (but subject to a maximum of six years). Section 21F(h)(1)(B)(iii). A whistleblower's remedies include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses. Section 21F(h)(1)(C).

Even though the statute by its terms provides the new cause of action only to "whistleblowers," which Section 21F(a)(6) of the Act defines as individuals who provide information to the SEC, a federal district court has recently concluded that the protection in 21F(h)(1)(A)(iii) for individuals whose disclosures are "required or protected" under SOX extends to employees who have reported internally but not reported their information to the SEC. See Egan v. TradingScreen, Inc. (Egan I), No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). Egan I also held that an employee who provides information to someone who then passes it on to the SEC can be considered a "whistleblower" under the statute. Id. at *8-9. On a motion to dismiss the plaintiff's amended complaint, however, the Court held that the plaintiff had failed to provide specific allegations that his reports had been passed on to the SEC by internal investigators at the company, and thus the plaintiff was not a "whistleblower" and had not engaged in protected activity under the statute. See Egan v. TradingScreen Inc. (Egan II), No. 10-cv-08282, 2011 WL 4344067, at *2-4 (S.D.N.Y. Sept. 12, 2011). This decision is potentially far-reaching as it would allow plaintiffs who have engaged in protected activity under

[9] Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add Section 21F, which establishes the whistleblower award program. Citations herein are to the Exchange Act, in accordance with the practice of the Securities and Exchange Commission ("SEC"). These rules also appear at 17 C.F.R. pt. 240 and 249 (2012).

Section 806 of SOX to circumvent the administrative scheme outlined in SOX and take their claims directly to federal court, and to do so with the benefit of a longer statute of limitations (180 days under SOX versus three years for claims filed in court under the Dodd-Frank Act, Section 21F(h)(1)(B)(iii)(bb)).

III. CONSUMER PRODUCTS SAFETY WHISTLEBLOWER PROTECTIONS

In the wake of scandals over lead paint found in toys and other recalls in the last few years, Congress passed the "Consumer Products Safety Reform Act of 2008," a broad set of amendments to the Consumer Products Safety Act. The Act was signed into law and became effective on August 14, 2008. Section 219 of the Act, which has been unofficially codified as 15 U.S.C.A. § 2087, provides for new whistleblower protections.

A. Protected Activity

This statute provides a civil remedy to employees of manufacturers, private labelers, distributors, or retailers of consumer products who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they reasonably believed to be violations of consumer safety laws enforced by the United States Consumer Product Safety Commission ("the Commission"). 15 U.S.C.A. § 2087(a).

B. Consumer Product Safety Laws

Under the new Act, an employee has to have a reasonable belief that his or her employer violated consumer product safety laws. The Consumer Products Safety Act ("CPSA"), 15 U.S.C. §§ 2051-2084, created consumer product safety laws and established the Commission, which is charged with protecting the public from unreasonable risks of serious injury or death from consumer products. The CPSA defines the term "consumer product" as any article, or component part thereof, produced or distributed for: (1) sale to a consumer for use in or around a permanent or temporary household, school, or in recreation, and (2) for the personal use in or around a permanent or temporary household, school, or in recreation. 15 U.S.C. § 2052. While the Commission has jurisdiction over more than 15,000 different products under this definition, the CPSA excludes products from the Commission's jurisdiction whose regulation expressly lies in another federal agency's jurisdiction, for example food, cosmetics, medical devices, tobacco products, firearms and ammunition, motor vehicles, pesticides, aircrafts, and boats. Id.

Under the CPSA, the Commission has power to develop safety standards and pursue recalls for consumer products that present unreasonable or substantial risks of injury or death to consumers. 15 U.S.C. §§ 2056 and 2061. The Commission also has the power to ban a product if there is no feasible alternative. 15 U.S.C. § 2057. While the Commission's jurisdiction is very broad, the CPSA (with some exceptions) leaves it up to the Commission to determine precisely what to regulate and/or how to regulate it. 15 U.S.C. § 2056. As such, not all dangers to consumer safety will be violations of the CPSA or the Commission's rules, regulations, or orders because the Commission may have only enacted voluntary guidelines or weak regulations. See http://www.cpsc.gov/businfo/regsbyproduct.html (website containing links that provide guidance regarding mandatory and voluntary standards).

The CPSA, however, requires that every manufacturer, distributor, and retailer of a consumer product must immediately inform the Commission if it obtains information that reasonably supports the conclusion that the consumer product: (1) fails to comply with the applicable consumer safety rule; (2) contains a defect that could create a substantial risk of injury to the public; or (3) create an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b). Failure or refusal to follow this notification requirement expressly violates the CPSA. 15 U.S.C. § 2068(a)(3).

C. Forms of Protected Activity

The new Act protects four types of whistleblowing activities. The first form of protected activity is when an employee provides, cause to be provided, or is about to provide or cause to be provided information relating to any violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(1). The employee can provide that information to the employer, the Federal Government, or the attorney general of a state. Id.

The second and third forms of protected activity protect employees who assist in proceedings. An employee is protected under the Act when he or she testified or is about to testify in a proceeding concerning a violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(2). An employee is also protected if he or she assisted or participated, or is about to assist or participate in, such a proceeding. 15 U.S.C.A. § 2087(a)(3).

The fourth form of protected activity under the Act protects internal whistleblowers. An employee is protected under the Act if he or she objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(4).

Importantly, the Act protects an employee who engages in one or more of these four forms of protected activity regardless of whether the whistleblowing act was at the employee's initiative or in the ordinary course of the employee's duties. 15 U.S.C.A. § 2087(a).

D. Covered Employers

The Act prohibits manufacturers, private labelers, distributors, or retailers, from retaliating against an employee who has engaged in protected activities. 15 U.S.C.A. § 2087(a). The CPSA defines manufacturer as "any person who manufactures or imports a consumer product." 15 U.S.C. § 2052(a)(4). A distributor is defined as "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce," but excluding manufacturers or retailers. 15 U.S.C. § 2052(a)(5). A retailer is defined as "a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer." 15 U.S.C. § 2052(a)(6). Lastly, a private labeler is defined as "an owner of a brand or trademark on the label of a consumer product which bears a private label." 15 U.S.C. § 2052(a)(7)(A). A consumer product bears a private label when (1) the product is labeled with the brand or trademark of a person other than a manufacturer of the product, (2) the person with whose brand or trademark the product has been labeled has authorized it to be so labeled, and (3) the brand or trademark of a manufacturer of such product does not appear on the label. 15 U.S.C. § 2052(a)(7)(B).

E. Prohibited Retaliation

The Act prohibits a covered employer from "discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment." 15 U.S.C.A. § 2087(a).

F. The Litigation Process

To qualify for relief under the Act, the employee must file a complaint with the Secretary of Labor no later than 180 days after the date on which the violation occurred. 15 U.S.C.A § 2087(b)(1). The complaint must identify the person responsible for the retaliatory act or acts. Id.

After a claim has been filed, the Secretary of Labor will then conduct an investigation, if it determines that the employee has stated a *prima facie* case that his protected conduct was a contributing factor in an unfavorable employment action and the employer has failed to rebut the claim by clear and convincing evidence. 15 U.S.C.A. § 2087(b)(2)(B)(i)-(ii). Otherwise, the Secretary of Labor will dismiss the complaint without an investigation. 15 U.S.C.A. § 2087(b)(2)(B)(i).

To ultimately find in favor of the employee, the Secretary of Labor must determine that the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint and that the employer failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected action. 15 U.S.C.A. § 2087(b)(2)(B)(iii)-(iv).

The Secretary is supposed to issue written findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. 15 U.S.C.A. § 2087(b)(2)(A). Parties have 30 days after "notification of findings" to object to the determination and request a hearing on the record. Id. Reinstatement is not stayed pending the hearing. Id. A final order must issue within 120 days of the hearing. 15 U.S.C.A. § 2087(b)(3)(A). A party may petition for review of a final agency order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. 15 U.S.C.A. § (b)(5)(A).

If the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the complainant may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. 15 U.S.C.A. § 2087(b)(4). The Act appears to give the Secretary of Labor up to 300 days to issue a final decision: if the Secretary of Labor issues the written determination on day 210, then the Act provides for another 90 days to make a final decision. The Act expressly provides a right to a jury trial at the request of either party. Id.

G. Available Remedies

Under the Act, the Secretary of Labor is directed to provide a broad range of remedies in successful cases, including: affirmative action to abate the violation, reinstatement of the complainant to his or her former position with back pay, and compensatory damages. 15 U.S.C.A. § 2087(b)(3)(B)(i)-(iii). Notably, the Act requires, at the request of the complainant, the Secretary of Labor to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. 15 U.S.C.A. § 2087(b)(3)(B)(iii).

If the complainant brings an action in District Court because the Secretary of Labor has failed to issue a final decision within the statutorily required time, the Act allows the district court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, compensatory relief, injunctive relief, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 15 U.S.C.A. § 2087(b)(4).

IV. FDA FOOD SAFETY MODERNIZATION ACT WHISTLEBLOWER PROTECTIONS

A. Introduction

In response to recent high-profile outbreaks of foodborne illnesses and nationwide food recalls, Congress passed the FDA Food Safety Modernization Act ("FSMA"), Pub. L. No. 111-353, 124 Stat. 3885, which expands the regulatory authority of the FDA and provides sweeping amendments to the Federal Food, Drug, and Cosmetic Act ("FDC"), 21 U.S.C. § 301. Signed into law by President Obama on January 4, 2011, the FSMA is designed to implement preventative process controls to enhance the food-safety system and hold the food industry accountable for preventing contamination. Section 402 of the FSMA, which became effective immediately upon signing, establishes robust whistleblower protections for employees in the food-service industry who play a front-line position in protecting the integrity of the nation's food supply.

B. Covered Employers and Employees

The whistleblower protections created by Section 402 broadly apply to employees of any entity engaged in "the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." §402(a). Thus, Section 402 protects employees at multiple points along the food-supply chain—such as a truck driver transporting food or an assembly line worker at a processing plant—who speak out against violations of food safety laws enforced by the FDA.

C. Protected Activity

Under Section 402, an employer may not retaliate against an employee who: (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information the employee reasonably believes to be a violation of the FDC or any order, rule, regulation, standard, or ban under the FDC; (2) testified or is about to testify in a proceeding concerning such violation; (3) assisted or participated or is about to assist or participate in such a proceeding; or (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee "reasonably believed" to be in violation of the FDC, or any order, rule, regulation, standard, or ban under the FDC. §402(a)(1)-(4).

It is important to note that the whistleblower protections under Section 402 only extend to disclosures of violations of food-safety regulations enforced by the FDA. The language of Section 402 does not cover violations of food-safety regulations enforced by the USDA, which generally cover the meat and poultry industries. Food-safety regulations enforced by the FDA cover nearly all other food products, such as fruits, vegetables, nuts and grains.

D. Prohibited Retaliation

Covered employers are prohibited from discharging or "otherwise discriminat[ing] against an employee with respect to compensation, terms, conditions, or privileges of employment" in retaliation for the employee engaging in protected activity. Pub. L. No. 111-353, §402(a). Notably, Section 402 explicitly provides whistleblower protection regardless of whether the protected activity occurs at the employee's initiative or in the ordinary course of the employee's duties. Id.

E. The Litigation Process

The Secretary of Labor is tasked with enforcing the whistleblower protections under Section 402, which includes the adjudication of whistleblower complaints filed with the Department of Labor. An employee alleging retaliation for engaging in protected activity under the FSMA must file a complaint with the Secretary no later than 180 days after the date on which the violation occurred. §402(b)(1). The complaint must identify the person responsible for the retaliation. Id.

After the complaint has been filed, the Secretary will initiate an investigation if it determines that the employee has made a *prima facie* case showing that his or her protected activity was "a contributing factor" in the unfavorable employment action alleged in the complaint, and that the employer has failed to rebut the claim by clear and convincing evidence. §402(b)(2)(C)(i)-(iv). Otherwise, the Secretary will dismiss the complaint without an investigation. Id.

If the complaint survives dismissal, the Secretary is to initiate an investigation no later than 60 days after the complaint has been filed. §402(2)(a). The Secretary will only find reasonable cause that a Section 402 violation has occurred if the employee demonstrates that her protected activity was "a contributing factor" in the unfavorable employment action. §402(b)(2)(C)(i). The employer can avoid liability only by demonstrating by clear and convincing evidence that it would have taken the unfavorable employment action in the absence of the employee's protected activity. §402(b) (2)(C)(iv).

The Secretary is to issue a written determination of its findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. §402(b)(2)(A)-(B). Should the Secretary conclude that the employee's complaint is frivolous or has been brought in bad faith, the Secretary may award the prevailing employer a "reasonable attorneys' fee," not to exceed $1,000. §402(b)(3)(D).

Parties have 30 days after the "notification of findings" to file an objection to the determination and request a hearing on the record. §402(b)(2)(B). The requested hearing is to be "conducted expeditiously," but reinstatement is not stayed pending the hearing. Id. The Secretary must issue a final order within 120 days of the hearing. §402(b)(3)(A). However, any party adversely affected or aggrieved may obtain review of the order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. Pub. L. No. 111-353, §402(b)(5)(A). Unless ordered by the court, the commencement of the review proceedings will not operate as a stay of the final order. Id.

If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the employee may bring an action for *de novo* review in the U.S. District Court with jurisdiction over the action. Pub. L. No. 111-353. §402(b)(4)(A). Section 402 expressly provides a right to a jury trial at the request of either party. Id.

F. Available Remedies

If the Secretary of Labor determines that a violation of Section 402 has occurred, the Secretary is directed to order affirmative action to abate the violation, reinstatement of the employee to his or her former position with back pay, and compensatory damages. Pub. L. No. 111-353, §402(b)(3)(B)(i)-(iii). Notably, Section 402 requires, at the request of the complainant, the Secretary to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys' and expert witness fees. Pub. L. No. 111-353, §402(b)(3)(C).

If the complainant brings an action in District Court because the Secretary failed to issue a final decision within the statutorily required time, the FSMA allows the District Court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, and "compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees." Pub. L. No. 111-353, §402(b)(4)(B).

V. DEFENSE CONTRACTOR WHISTLEBLOWER PROTECTIONS

The wars in Afghanistan and Iraq have seen unprecedented levels of private defense contractors in prominent military support and reconstruction roles. This burgeoning niche is in addition to the multibillion dollar defense contracting industry already in existence prior to the most recent military operations. The lure of lucrative government contracts, combined with the lives and taxpayer dollars at stake in the performance of those contracts, necessitates whistleblower protections for defense contractors and their employees. This protection is found in 10 U.S.C. § 2409. There is very little case law interpreting the law's provisions.

A. Protected Activity

Under the defense contractor whistleblower law, an employee of a defense contractor is protected for making disclosures to one of several entities of misconduct by his or her employer. To be protected by the act, the employee must reasonably believe that she has information that evidences: (1) "gross mismanagement of a Department of Defense contract or grant;" (2) "a gross waste of Department of Defense funds;" (3) "a substantial and specific danger to public health or safety;" or (4) "a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant." 10 U.S.C.A. § 2409(a).

Protection of reprisal is available to employees who disclose such information to "a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice." Id.

B. Covered Employers

The term "contractor" is defined broadly within the statute to mean "a person awarded a contract or a grant with an agency." 10 U.S.C.A. § 2409(e)(4). Covered agencies include the Department of Defense, the Army, the Navy, the Air Force, the Coast Guard, and the National Aeronautics and Space Administration (NASA). See 10 U.S.C.A. § 2303(a).

C. Prohibited Retaliation

Under the statute, a contractor may not discharge, demote, or otherwise discriminate against an employee for engaging in any of the forms of protected activity described above. 10 U.S.C.A. § 2409(a).

D. The Litigation Process

An employee alleging reprisal for protected activity under the law must file a complaint with the Inspector General ("IG") of the Department of Defense in most cases or with the IG of NASA if the complaint concerns NASA. 10 U.S.C.A. §2409(b)(1). Unlike most whistleblower statutes, the defense contractor anti-reprisal law does not contain a statute of limitations for filing a complaint. If it does not find that the complaint is frivolous, the IG has 180 days to investigate it and submit a report to the complainant, the respondent contractor, and the head of the relevant agency with whom the private party contracted. 10 U.S.C.A. §2409(b)(1), (2)(A). If the agency denies relief or fails to file an order granting relief within 210 days after the filing of the complaint, the complainant may file in federal district court, without regard to the amount in controversy. 10 U.S.C.A. §2409(c)(2). Either the complainant or the respondent may request a jury trial. Id.

E. Available Remedies

Within 30 days after receiving a report from an Inspector General regarding the whistleblower complaint, the head of the relevant agency may determine whether the employee was subjected to reprisal by the contractor and may deny or grant relief. 10 U.S.C.A. §2409(c)(1). There are several available forms of relief. The broadest is an order that the contractor "take affirmative action to abate the reprisal," which is a general make-whole provision designed to restore the pre-retaliation status quo. 10 U.S.C.A. §2409(c)(1)(A). More specifically, the act mentions as possible remedies reinstatement, compensation (including back pay), employment benefits, and a restoration of pre-reprisal conditions of employment. 10

U.S.C.A. §2409(c)(1)(B). Additionally, a successful claimant may obtain reasonable attorneys' fees and expenses, including expert witness fees. 10 U.S.C.A. §2409(c)(1)(C).

VI. FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS

The False Claims Act ("FCA") is a law intended to provide an incentive to private citizens to file claims on behalf of the Federal Government for making fraudulent claims against the government. See 31 U.S.C. §§ 3729 - 3733. Successful claimants under the FCA receive a portion of the recovery, often approximately 15-25%, with the remainder going to the government. See 31 U.S.C.A. § 3730(d). The Dodd-Frank Act also strengthened the FCA and created new whistleblower protections and incentive programs to reward individuals who report violations of the law that result in monetary sanctions against the offending party.

Under the FCA, a person is liable for a fine and treble damages if that person:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

29 U.S.C.A. § 3729(a)(1)(A) – (G).

An employee who participates in an FCA action is protected under the act's whistleblower protection provisions. See 31 U.S.C. § 3730(h). The law protects employees from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because the employee has sought to stop an employer from engaging in any of the acts that would violate 31 U.S.C. § 3729(a)(1). Id. Employees engage in protected activity when they meet the "distinct possibility" standard under which protected activity occurs when an employee's opposition to fraud takes place in a context where "litigation is a distinct possibility, when the conduct reasonably could lead to a viable FCA action, or when…litigation is a reasonable possibility." Mann v. Heckler & Koch Defense, Inc., 2010 WL 5262729, at *3 (4th Cir. 2010); Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 869 (4th Cir.1999).

Section 1079(b) of the Dodd-Frank Act contains significant changes to the anti-retaliation provisions of the FCA regarding the scope of activity protected from retaliation. First, Section 1079(b) of the Dodd-Frank Act amends the FCA by expanding the concept of protected activity to include "lawful acts done by the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of [the False Claims Act]." As a result, 31 U.S.C. § 3730(h) now encompasses a broader range of activities that could further a potential qui tam action or could halt a violation of the FCA, including protections against associational discrimination. Second, Section 1079(b)(1)(c) amends the FCA to remove the statutory language of ''agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter'' and instead inserts ''agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." This new statutory language should increase both the scope of protected activity and the class of individuals protected under the FCA's anti-retaliation provision, but the extent to which the courts are willing to interpret this amended language remains to be seen.

To prove that an employer retaliated against an employee in violation of 31 U.S.C. § 3730(h), an employee must demonstrate that: (1) she engaged in protected activity; and (2) that she was discriminated against because of her protected activity. See U.S. ex rel. Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 111 (3d Cir. 2007); see also Bell v. Dean, 2010 WL 2976752 (M.D. Ala. July 27, 2010) (plaintiff's explicit threats to report unauthorized use of funds, in conjunction with documents evidencing that defendants had submitted false claims to the government qualified as protected activity); U.S. ex rel Cooper v. Gentiva Health Servs., Inc., 2003 WL 22495607 (W.D. Pa. 2003) (denying summary judgment on FCA retaliation claim where plaintiff successfully pled he engaged in protected activity where he internally complained of the employer's fraudulent conduct). To demonstrate that she was discriminated against "because of" conduct in furtherance of a False Claims Act suit, an employee must show that her employer had knowledge of the protected activity and that her employer's retaliation was motivated, at least in part, by the employee's engaging in protected activity. See Hefner, 495 F.3d at 111.

The United States District Court for the Southern District of West Virginia recently held that investigatory efforts, short of filing suit, constitute protected activity for the purposes of the anti-retaliation provision. Williams v. Basic Contracting Servs., Inc., 2010 WL 3244888 (S.D. W.Va. Aug. 17, 2010). The court noted that the plaintiff had not filed a qui tam suit, but had located a copy of the defendant's government contract and spoken to people regarding alleged fraudulent billing practices. The court held that this was sufficient to constitute protected activity under the anti-retaliation provision.

The employee may bring her whistleblower claim in federal district court. 31 U.S.C.A. § 3730(h)(2). Section 1049(b) of the Dodd-Frank Act amends the FCA to provide that an employee may bring a civil action under the FCA against a retaliatory employer up to three years after the date of the retaliation. See 31 U.S.C.A. § 3730(h)(2). This amendment provides much-needed clarity, in light of a recent Supreme Court decision that required plaintiffs to engage in the uncertain task of identifying and applying the most analogous state-law statute of limitations to FCA retaliation claims. See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409 (2005) (holding that the FCA's six-year statute of limitations did not govern FCA civil actions for retaliation). However, this amendment does not explicitly apply retroactively to cases filed prior to the Dodd-Frank Act, thus, for those cases, courts continue to apply a state-law analogue's statute of limitations. See, e.g., Riddle v. Dyncorp International, Inc., No. 11-10155 (slip op.) (5th Cir. Jan. 5, 2012) (reversing the district court's dismissal because the lower court was incorrect to apply the Texas Whistleblower's 90-day statute of limitations and should have instead applied the two year statute of limitations applicable to personal injury claims, which the Fifth Circuit found more analogous to FCA claims); Saunders v. District of Columbia, 789 F. Supp. 2d 48 (D.D.C. 2011) (holding that a three year statute of limitations applies because both the FCA and the analogous District of Columbia False Claims Act both have three year statutes of limitations, and indicating but not deciding that the amendment should apply retroactively).

In the very recent case of Harrington v. Aggregate Industries-Northeast Region, Inc., No. 11-1511 (1st Cir. Feb. 7, 2012), the First Circuit reversed the district court's grant of summary judgment to defendant in plaintiff's FCA retaliation case. The decision provides a thorough analysis of what is required for a plaintiff to state a prima facie case under the anti-retaliation provisions of the FCA and holds, for the first time at the appellate level, that the McDonnell Douglas framework, borrowed from Title VII, applies to FCA retaliation cases.

Aggregate supplied concrete for the "Big Dig" highway project in Boston. Joseph Harrington, Plaintiff-Appellant and other employees brought a qui tam action against Aggregate, alleging that Aggregate often substituted substandard material in violation of its contract specifications. The qui tam action was filed in June 2005 under seal, naming Aggregate and several subsidiaries as defendants. Harrington kept working at Aggregate. In March 2007, Aggregate management learned the identities of the relators, including Harrington. Following this, the qui tam, which settled for several million dollars. The appellant received a percentage of this settlement as a relator. A few days after signing the qui tam settlement agreement, Aggregate terminated him. Id. at 2-4.

Harrington and his co-relator sued Aggregate. The district court granted summary judgment as to Harrington on the basis that appellant had failed to present evidence of a causal connection between his role as relator and Aggregate's decision to terminate his employment. Id. at 6.

As a matter of first impression at the appellate level, the First Circuit Court of Appeals held that the McDonnell Douglas burden-shifting framework is the appropriate framework for retaliation suits brought under the FCA where there is no direct evidence of retaliation. The court found that the fact that Aggregate management learned that Harrington was a relator in March 2007 and then discharged him seventy-two hours after he signed the qui tam settlement was sufficient to state a prima facie case of retaliation. Id. at 9-11.

The court rejected Aggregate's contention that appellant failed to show knowledge that any on-site managers learned of his status and stated, "To clear the low bar required to establish a prima facie case, the fact that high-level Aggregate executives learned of the appellant's whistleblowing several months before suffices to show knowledge." Id. at 11. The court likewise refuted defendants' argument that Harrington did not engage in protected activity because executing a settlement agreement is not conduct in furtherance of an FCA action. The defendants pointed to an earlier First Circuit case that delineated what sort of pre-litigation activity might qualify for protection under the anti-retaliation provisions. This reasoning, the court explained, was inapposite to Harrington's situation. Harrington was a relator in a the qui tam action when it was resolved and his "execution of the settlement agreement was surely conduct in furtherance of that action." Id. at 12-13.

Aggregate also argued that plaintiff had not showed causation because there was a four month gap between management learning that Harrington was a relator and his firing. However, the court explained that the appropriate time span to look at – from the time of his signing the settlement agreement until the time he was fired – was sufficiently brief, only 72 hours. The court pointed out that if Aggregate had terminated plaintiff before the settlement, it would have made settlement more difficult to reach. Id. at 13-14.

Finally, the court held that although Aggregate had put forth a legitimate non-retaliatory reason for terminating plaintiff – his refusal to submit to a second drug test – "the facts underlying Aggregate's efforts to force a drug test on appellant, along with the temporal proximity between the time that he signed the settlement agreement and the time of his dismissal, create a trial-worthy issue about whether Aggregate's proferred reason for firing him was a sham." In so holding, it again reiterated the close temporal proximity and pointed out that there was doubt that Aggregate followed its own drug testing protocol. Id. at 14-19.

Some recent district court decisions have clarified what types of claims can form the basis of an FCA retaliation claim. The United States District Court for the District of Massachusetts recently held that kickbacks and off-label promotions can predicate an FCA whistleblower retaliation claim. U.S. ex rel. Gobble v. Forest Labs, Inc., 2010 WL 2933925 (D. Mass. July 23, 2010). The defendants moved to dismiss, arguing that the relator had not engaged in protected activity because the basis of relator's complaint was non-compliance with laws governing pharmaceutical sales. The court rejected his contention and also held that the relator's complaints to his supervisor were sufficient to put defendants on notice of his protected conduct.

In Gordon v. ArmorGroup, NA, 2010 WL 3418219 (E.D. Va. Aug. 27, 2010), the court held that a plaintiff an alleged constructive discharge can form the basis of an FCA claim. The plaintiff, a former director of operations for a U.S. security service overseas, brought suit against three private security providers, one of their managers, and another individual alleging that the defendant's violation the anti-retaliation provision of the FCA and Virginia state law by constructively discharging him after he engaged in protected activity. Although the court dismissed plaintiff's state law claims, finding that at-will employees cannot be constructively discharged under Virginia law, it allowed his FCA claims to move forward on the basis of the same alleged constructive discharge.

The remedies available to a successful claimant are generally designed to "make the employee whole." 31 U.S.C. § 3730(h). Remedies include reinstatement with seniority, double back pay with interest, and special damages including attorneys' fees. Id.

VII. OTHER STATUTORY WHISTLEBLOWER PROTECTIONS

The following list includes other statutory whistleblower protections and a brief description of their coverage:

1. **Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660(c)**: Protects employees from discharge or discrimination based on instigation of or participation in a proceeding against his or her employer for occupational hazards prohibited by the act. The employee must file a complaint with OSHA within 30 days of the retaliation.

2. **The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105**: Provides protection for employees of commercial motor vehicles to report noncompliance with safety, health, or security regulations. The employee must file a complaint with OSHA within 180 days.

3. **The Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. § 2651**: Provides employee protection against retaliation for reporting violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or non-profit private. The employee must file a complaint with OSHA within 90 days.

4. **The International Safe Container Act of 1977 (ISCA), 46 U.S.C. §** 80507: Protects employees who report unsafe cargo containers. The employee must file a complaint with OSHA within 60 days.

5. **The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i)**: Under the SDWA, any public building—whether constructed before or after the passage of the SDWA—must have lead-free drinking water. Additionally, any new construction—public or private—must have lead-free drinking water. Employees are protected from retaliation for reporting potential violations of the law and must file a complaint with OSHA within 30 days.

6. **The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367**: Prohibits the release of hazardous levels of pollution into any waters that constitute a natural habitat for living things. An employee who reports any misrepresentations or noncompliance by the employer is protected from employment retaliation. The employee must file a complaint with OSHA within 30 days.

7. **The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622**: The TSCA regulates the thousands of industrial chemicals produced or imported into the United States to protect the health and safety of humans and the environment. It sets guidelines for the EPA's testing, inspection, and tracking of industrial chemicals. TSCA also allows the EPA to ban the manufacture of chemicals it considers to pose an unreasonably high risk. An employee who reports potential violations of the TSCA or in any way assists in proceedings or investigations of such violations is protected from employment retaliation. The employee must file a complaint with OSHA within 30 days.

8. **The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 7001**: The SWDA regulates the management of hazardous waste. It also provides funds for and assists in the development of technology and facilities to recover energy and other commodities from waste. An employee is protected for reporting abuses of funding and assistance, violation of waste management requirements, or other potential violations of the Act. The employee must file a complaint with OSHA within 30 days.

9. **The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622**: The Clean Air Act is a comprehensive statute establishing standards for air quality, acceptable pollutants, and related reporting and inspection procedures. The specific provisions of the statute are

exhaustive, but whistleblower cases are most often brought when a company misrepresents its emissions levels or fails to comply with reporting and cleanup standards. An employer may not retaliate against an employee who reports any misreporting or noncompliance by the employer. The employee must file a complaint with OSHA within 30 days.

10. **The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610**: CERCLA provides for liability, compensation, and emergency response for hazardous substances that have been released or are threatening to be released into the environment. Employees are protected if they have provided information to the local or federal government, have filed a complaint about their employer under the Act, or have participated in any CERCLA proceeding – for example by testifying or aiding in an investigation – against her or his employer. An employee must file a complaint with OSHA within 30 days.

11. **The Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851**: This ERA established the Nuclear Regulatory Commission. Under the Act, an employee is protected for reporting violations of the nuclear safety provisions contained therein. An employee must file a complaint with OSHA within 180 days.

12. **The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121**: Protects employees who provide information to or assist in an investigation by the government or an internal investigation regarding a potential violation of the laws of the Federal Aviation Administration (FAA) or any other federal law or regulation related to air carrier safety. An employee must file a complaint with OSHA within 90 days.

13. **The Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129**: Protects employees who provide information to or assist in an investigation of potential violations of pipeline safety standards, inspection and repair requirements, and training requirements for employees performing sensitive tasks. An employee must file a complaint with OSHA within 180 days.

14. **The Federal Rail Safety Act of 1970 (FRSA), 49 U.S.C. § 20109**: Protects employees providing information to or assisting in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or their employer about a potential violation of any laws pertaining to: (1) railroad safety and security or (2) gross fraud, waste, or abuse of funds intended for safety and security. Additionally, an employee is protected for reporting hazardous safety and security conditions, refusing to work under such conditions, or refusing to authorize the use of any safety- or security-related equipment, track, or railroad structures. An employee must file a complaint with OSHA within 180 days.

15. **The National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142**: The NTSSA is the metropolitan transit system equivalent of the FRSA. It similarly protects employees, contractors, and subcontractors of metropolitan transit systems from retaliation for reporting potential violations of laws concerning (1) public transportation safety and security or (2) gross fraud, waste, or abuse of funds intended for safety and security. Additionally, an employee is protected for reporting hazardous safety and security conditions, refusing to work under such conditions, or refusing to authorize the use of any safety- or security-related equipment, track, or railroad structures. Employees must file a complaint with OSHA within 180 days.